In the Supreme Court of the United States

October Term, 1973
No. 73 582

CITY OF PITTSBURGH, *Petitioner*

vs.

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPPARD, JR., t/a Stanwix Auto Park; JOHN COMINOS, t/a Liberty Parking; JOHN STABILE and ROCCO A. DEL SARDO, t/a Wm. Penn Parking Lot; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING—CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Respondents

PETITION OF THE CITY OF PITTSBURGH FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

GRACE S. HARRIS,
Special Assistant City Solicitor,
313 City-County Bldg.,
Pittsburgh, Pa. 15219,
Attorney for Petitioner.

Of Counsel:
RALPH LYNCH, JR.,
City Solicitor.

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840
Harry Haas, Pittsburgh Representative, Tel. 421-4723

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To: The Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, the City of Pittsburgh, respectfully prays that a writ of certiorari issue to review the decree of the Supreme Court of Pennsylvania entered in the above case on July 2, 1973.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, dated July 2, 1973, appears at page 1a of the Appendix and is reported at Pa. , 307 A. 2d 851.

The opinion of the Commonwealth Court of Pennsylvania, dated October 10, 1972, upon rehearing, appears at page 51a of the Appendix and is reported at 6 Commonwealth Ct. 433, 295 A. 2d 349.

The first opinion of the Commonwealth Court of Pennsylvania, dated June 8, 1972, appears at page 55a of the Appendix and is reported at 6 Commonwealth Ct. 433, 291 A. 2d 556.

The opinion and final decree of the court en banc of the Court of Common Pleas of Allegheny County, dated July 14, 1971, appear at pages 78a and 83a of the Appendix and are unreported.

The opinion and decree nisi of the Court of Common Pleas of Allegheny County, dated March 19, 1971, appear at pages 84a and 102a of the Appendix and are reported at 119 P.L.J. 327.

Jurisdiction
Questions Involved

JURISDICTION

Petitioner seeks review of the decree and opinion of the Supreme Court of Pennsylvania dated July 2, 1973 (A. 1a). Rehearing was denied by the Supreme Court of Pennsylvania by order dated August 7, 1973. The jurisdiction of the Supreme Court of the United States is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. §1257 (3).

QUESTIONS INVOLVED

I. Do this Court's interpretations of the due process clause and the separation of powers doctrine prohibit the judiciary from imposing a limitation upon the legislatively set rate of a revenue tax even where the taxpayer competes with a governmental agency exempt from certain taxes?

II. Have respondents proved confiscation where they have not shown (1) that they are forced out of business, and (2) that the tax cannot be passed on to customers?

(Petitioner requests that these questions be answered in the negative.)

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

The fourteenth amendment to the Constitution of the United States provides, in relevant part:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

City of Pittsburgh Ordinance No. 704 of 1969 is set forth in full beginning at page 103a of the Appendix.

STATEMENT OF THE CASE

On February 20, 1970 twelve operators (respondents herein) of off-street parking facilities located in the central city area of the City of Pittsburgh filed an action to enjoin enforcement of City of Pittsburgh Ordinance No. 704 of 1969 (A. 2a)* (herein the "Parking Tax Ordinance").

The Parking Tax Ordinance was enacted *"to provide for the general revenue"* (A. 103a) by imposing a tax on the privilege of engaging in non-residential parking transactions for a consideration. (Emphasis added.) It established the rate at 20% of the gross receipts derived from engaging in parking transactions, superseding and replacing a 1968 ordinance which had levied the identical tax at the rate of 15%. The 15% tax enacted in 1968 had, in turn, superseded and replaced the initial Parking Tax Ordinance enacted in 1962 at the rate of 10% (A. 2a).

At the time of suit, respondents owned and operated approximately 17,000 of the 18,000 private spaces in the downtown area of the City, thus controlling approximately 71% of the 24,300 spaces there. (A. 2a; 53a; 62a). Other private operators, not respondents in this case, controlled about 1000 spaces (4%). The balance of about

* References designated by "A." are to pages of the Appendix filed herewith.

References designated by "R." are to pages of the Record filed in the Supreme Court of Pennsylvania.

6100 spaces (25%) was owned by the Parking Authority of the City of Pittsburgh, an independent agency of the Commonwealth of Pennsylvania created pursuant to the Parking Authority Law of June 5, 1947, P. L. 458, 53 P.S. §341 et seq. (A. 62a; Finding No. 8, A. 87a).

The 71% of the industry represented by respondents paid $1.3 million in parking tax out of the total industry payments of $2.1 million at the 15% rate in 1969, and respondents paid $1.6 million at the 20% rate in 1970 (A. 62a; R. 617a). The tax has thus raised approximately $2.5 million dollars per year since 1970 (A. 43a; R. 617a).

This suit sought to enjoin the enforcement of the Parking Tax Ordinance on the grounds (1) that it created a discriminatory and arbitrary classification in violation of the equal protection and uniformity clauses of the federal and state constitutions; and (2) that it constituted a confiscatory taking in violation of the due process clause of the fourteenth amendment (A. 85a). After an Answer was filed by the City, the matter was tried on September 15-17, 1970. On March 19, 1971, the Court of Common Pleas filed an Adjudication and Decree Nisi, together with Findings of Fact and Conclusions of Law (A. 84a). The Court held that the tax violated no constitutional provisions.[1]

[1] Both the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania unanimously agreed with the Court of Common Pleas and petitioner City that the Parking Tax was not violative of the equal protection clause or the uniformity clause. This statement will therefore deal only with those portions of the courts' opinions dealing with the due process clause.

Although the Pennsylvania Supreme Court, as noted by the dissents, paid scant heed to the chancellor's findings (A. 42a), which have the force and effect of a jury verdict (A. 28a), those findings, most of which were not disputed by the Supreme Court (A. 16a), are significant.

The chancellor, noting that respondents were all still in business, found that the parking tax was not forcing the operators out of business (A. 98a). The chancellor pointed out that respondents' gross receipts, *after* the parking tax, increased in 1969 despite the increase in the parking tax from 10% to 15%, and remained virtually stable for the first 6 months of 1970 after the increase from 15% to 20% (A. 99a). Moreover, he found that any decreased return resulted from increased labor costs and other operating expenses as well as the parking tax (A. 99a).

The chancellor's finding that the parking tax was not forcing respondents out of business was buttressed by his findings concerning their failure to pass the tax on to their customers. Among other things, the chancellor found (A. 16a; 42a; 89a-90a):

> "19. The demand for parking spaces in the City of Pittsburgh far exceeds the supply.
>
> 20. None of the plaintiffs have increased their rates since February of 1970.
>
> 21. Plaintiffs have not attempted to pass on the increased tax to the parking lot patrons.
>
> 27. The City of Pittsburgh experienced only a temporary reduction in the number of cars parked at its facility on the Wharf after it doubled its price for parking."

Furthermore, one of the respondents, Sheppard, testified on cross-examination as follows (R. 198a):

> "Q. Sir, has it been your experience in the past that when you increase the rates you also receive an increase in your revenue?
>
> A. Yes, sir."

The Appendix to the Dissenting Opinion of Justice Pomeroy (A. 49a) shows clearly that respondents themselves recognized that rates could be raised in order to maximize revenues.

Respondents' exceptions to the Decree Nisi of the Chancellor were overruled by the court en banc in an Opinion and Final Decree dated July 14, 1971 (A. 78a).

Respondents appealed to the Commonwealth Court of Pennsylvania, which issued an opinion on June 8, 1972 (A. 55a) and again, adhering to the same division after reargument, on October 10, 1972 (A. 51a). While suggesting that the tax rate was too high, the majority (4-3) recognized that courts cannot interfere with the legislative function of setting a tax rate when, as here, the ordinance is clearly an exercise of the taxing power (A. 64a).

The Supreme Court of Pennsylvania then allowed an appeal and, by a 4-3 majority, reversed the courts below. Justice Roberts, for the majority,[2] held that the parking tax violated the due process clause of the fourteenth amendment because of its high rate, combined with the fact that "the taxing body was in direct competition . . . with private enterprise"[3] (A. 21a).

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[2] Justice Roberts' opinion was joined in by only two other Justices. Justice O'Brien concurred in the result (A. 27a).

[3] Actually, §5 of the Parking Authority Law, 53 P.S. §345, provides in relevant part, that a Parking Authority "shall in no

Three justices of the Pennsylvania Supreme Court dissented. Justice Eagen, in an opinion concurred in by Chief Justice Jones and Justice Pomeroy, concentrated upon the incorrect legal underpinnings of the majority opinion, pointing out that the case law in this Court has long interpreted the due process clause to allow the legislative body to set a tax rate without interference from the judiciary (A. 27a). Justice Pomeroy, in a separate dissenting opinion, dealt largely with respondents' failure to show sufficient facts to entitle them to relief (A. 38a).

The City's petition for reargument was denied by per curiam order dated August 7, 1973, Justice Eagen dissenting (A. 50a).

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way be deemed to be an instrumentality of the city or engaged in the performance of a municipal function." Moreover, the Pennsylvania courts had, prior to this case, consistently distinguished between an authority and its organizing municipality. *Whitemarsh Twp. Auth. v. Elwert*, 413 Pa. 329, 332, 196 A. 2d 843 (1964); *Simon Appeal*, 408 Pa. 464, 184 A. 2d 695 (1962).

REASONS FOR GRANTING THE WRIT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT A LIMITATION UPON A REVENUE TAX

A. The Due Process Clause Does Not Limit the Discretionary Power of a Legislative Body To Select the Rate of a Revenue Tax Even Though an Industry May Be Harmed Thereby

The holding of the majority of the Supreme Court, invalidating the parking tax as violative of the due process clause of the fourteenth amendment, conflicts with the consistent holdings of this Court that the due process clause is not an impediment to the Legislature's power to impose any rate of taxation that the Legislature, in its wisdom, sees fit to levy for general revenue purposes.

It would be difficult to improve upon the formulation unanimously set forth by this Court when it sustained the 15 cents per pound excise tax on butter substitutes in *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934). That case, upon which both the majority in the Commonwealth Court (A. 65a) and the dissenters in the Supreme Court (A. 30a) relied heavily, held that the due process clause is a limitation upon a taxing statute only when the statute is not really a tax at all:

> "Except in rare and special instances, the due process of law clause contained in the Fifth Amend-

ment is not a limitation upon the taxing power conferred upon Congress by the Constitution. Brushaber v. Union Pac. R. Co., 240 U.S. 1, 24. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. French v. Barber Asphalt Paving Co., 181 U.S. 324, 329; Heiner v. Donnan, 285 U.S. 312, 326. That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. Compare McCulloch v. Maryland, 4 Wheat. 316, 423; Child Labor Tax Case, 259 U.S. 20, 37, et seq.; McCray v. United States, 195 U.S. 27, 60; Brushaber v. Union Pac. R. Co., supra, 240 U.S. 24-25; Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 614-615; Nichols v. Coolidge, 274 U.S. 531, 542. Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. McCray v. United States, supra, 195 U.S. 56-59."

In that case, the appellant company had ceased to make intrastate sales, claiming that the tax was prohibitive. Yet this Court, conceding that to be the case, nonetheless held that the tax did not violate the due process clause, citing several earlier cases to the same effect:

> *"Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may*

or will result in restricting or even destroying particular occupations or businesses (Citizens' Sav. & Loan Association v. Topeka, 20 Wall. 655, 663-664; McCray v. United States, supra, 195 U.S. 56-58; and authorities cited; Alaska Fish Co. v. Smith, 255 U.S. 44, 48, 49; Child Labor Tax Case, supra, 259 U.S. 38, 40-43), unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state. The present case does not furnish such a demonstration.

"The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the 10 per cent tax imposed upon the notes of state banks involved in Veazie Bank v. Fenno, 8 Wall. 533, 548. This Court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments." (Emphasis added.)

In dictum in *Magnano* this Court recognized that "in rare and special instances" a purported taxing statute could involve not an exertion of the taxing power, but the exertion of a different and forbidden power such as the confiscation of property. The majority in the court below seized on this language (A. 19a; 21a) in *Magnano* while ignoring the factual situation involved there, the acknowledged destruction of the business, which was held not to be a confiscation of property.

The question of whether a taxing measure is not really a taxing measure but confiscation cannot be answered by looking to the rate. If that were the case, *Magnano* would have been decided differently. A different result would also have been reached in *Alaska Fish Co. v. Smith*, 255 U.S. 44, 48 (1921), where this Court, speaking through Justice Holmes, upheld an Alaska statute levying a heavy tax upon persons manufacturing fish oil against the contention that it would confiscate the plaintiffs' business. This Court held:

> "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk."

Whereas the Pennsylvania Supreme Court has struck down this tax as "excessive and unreasonable" (A. 20a), this Court has held that the fourteenth amendment does not prohibit a tax merely because it is unwise, unfair, or burdensome. *Harvester Co. v. Dept. of Taxation*, 322 U.S. 435, 444 (1944).

The lesson of *Magnano* and *Alaska Fish Co.*, is that it takes more than a high rate to prove that a tax is not really a tax but a confiscation. This teaching the majority in the court below ignores. As stated by Justice Eagen in dissent (A. 31a):

> "The majority opinion does not indicate this taxing statute qua taxing statute is invalid, or the taxing measure 'does not involve an exertion of the taxing power,' which are the guidelines established by the Supreme Court of the United States. Rather, the majority opinion focuses on the tax rate and its

enforcement, and I view this as error. It is one thing to say a taxing statute is arbitrary and beyond the reach of the taxing power of the legislative branch, a point I do not contest, but it is quite another to say the exercise of the lawful taxing power is a violation of due process of law because of a high tax rate."

There is not a scintilla of evidence in the record of this case that the City wants to accomplish anything more in raising its parking tax 5% than to obtain additional revenue. The tax has been successful in raising revenue. Respondents' Exhibit 3 in this case shows that the 15% tax, enacted in 1968 for the year 1969, and never challenged in the courts, brought in over two million dollars in revenue for that one year. The 1970 tax, which is being paid, is exactly the same tax as the 1969 tax, except for a 5% increase in rate (A. 8a) required to augment the City's revenue to cover costs of inflation.

This tax did not, like Athena, spring full-grown from the head of Zeus. Rather, it is built upon the foundation of the earlier taxes, identical except as to rate since the year 1962 (A. 8a). The 10% tax had been sustained against constitutional challenge by the Supreme Court of Pennsylvania in *McGillick v. Pittsburgh*, 415 Pa. 581, 203 A. 2d 480 (1964), while Philadelphia's similar 10% gross receipts parking tax had been sustained, specifically against charges that it was confiscatory, in *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941) and *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940).

The fact that the tax raises revenue "obliterates any question of lack of due process." *Shapiro v. City of New*

York, 325 N.Y.S. 2d 787, 794, 67 Misc. 2d 1021 (1971), citing *Magnano* in sustaining a tax on professionals' earnings against a due process challenge.

In fact, even if the City had another purpose in addition to its revenue purpose, the fact that the tax raised revenue immunizes it from attack. This is so even if the revenue raised is negligible (not the case here) or the revenue purpose is secondary. *United States v. Sanchez*, 340 U.S. 42, 44 (1956).

B. The Rule That the Due Process Clause Does Not Limit a Revenue Tax Is Not Changed Where Government Competes With the Private Sector

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The majority purports to distinguish *Magnano; Alaska Fish; McCray v. United States*, 195 U.S. 56 (1904); *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 34 (1916); and similar cases[4] on the basis that here an added element exists, making it a case of first impression —the element of competition from the taxing body.[5]

Justice Roberts cites no authority for his theory, save a law review article, Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964), and one Hawaii case, *Hasegawa*

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[4] *Magnano* has most recently been cited with approval by this Court in *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). See also, *Bode v. Barrett*, 344 U.S. 583, 585 (1953).

[5] As noted in footnote 3, supra, the competition does not come from the taxing body. For the purposes of this first reason for granting the writ, however, it will be assumed *arguendo* that the characterization of the majority of the Pennsylvania Supreme Court was correct.

v. Main Pineapple Co., 52 Hawaii 327, 475 P. 2d 679 (1970). The theory enunciated in the former, by title and by content, deals not with taxation but with the police power, and is, by the author's own admission, inconsistent with numerous decisions of this Court. *See*, e.g., *U. S. v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), where this Court held that a government order shutting down private gold mines so that workers would be available for service in copper mines to produce ore necessary for the Government's war effort was not a compensable taking.

As pointed out in Justice Pomeroy's dissent at footnote 3 (A. 41a), the *Hasegawa* case retains no semblance of validity after the decision of this Court in *Dean v. Gadsden Times Publishing Co.*, U.S. , 93 S. Ct. 2264 (1973).

Justice Roberts is simply incorrect in his assertion that the competition aspect makes this a case of first impression.

The fact of the matter is that on several occasions this Court has been faced with almost identical situations, where the taxing body was competing with the taxed industry.[8] This issue, resurrected by the court below, was

[8] The attempt of the majority below to carve out an exception to the *Magnano* doctrine is not only inconsistent with the holdings of this Court, but also, it is submitted, evidences an unfortunate view of government as an entity apart from the people. The tax in *Magnano* aided the butter industry at the expense of the margarine industry to the point of eliminating the latter. Yet neither the majority below nor Professor Sax would hold that confiscation occurred there because, rather than favoring the

first decided by this Court over a century ago in *Veazie Bank v. Fenno*, 75 U.S. 482, 8 Wall. 533 (1869). There a 10% tax was imposed by Congress on the notes of state banks. This was in addition to other taxes aggregating 6% on state banks, for a total of a 16% tax. 75 U.S. at 488, 489 (dissenting opinion). As noted in the dissenting opinion, 75 U.S. 488, 490, the purpose of the tax on state bank notes was to foster the national banks at the expense of the state banks.

Nonetheless, despite the competition aspect, the Court sustained the tax against a confiscation argument such as is made here, holding, 75 U.S. at 487-8:

> "It is insisted, however, that the tax in the case before us is excessive and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the Bank, and is, therefore, beyond the constitutional power of Congress.
>
> "The first answer to this is that the Judicial cannot prescribe to the Legislative Departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsi-

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government operation over the private industry, the tax favored another private industry.

Yet it would seem to be exalting form over substance to distinguish the situation where the governmental body effects the will of the people through a tax favoring the butter industry from that where it accomplishes its goals by creating a governmental agency.

Carried to the logical conclusion, the holding below would prevent any taxation whatsoever, for by its very nature, taxation favors one segment of society over another.

bility of the Legislature is not to the courts but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

A second case directly in point is *Puget Sound Co. v. Seattle*, 291 U.S. 619 (1934). There a power and light company alleged a taking of property without due process because the City imposed a gross receipts tax upon it while both the company and the City were "engaged and actively *compete*[*d*] in the business of furnishing electric light and power to consumers for hire." (Emphasis added.) 291 U.S. at 621. This Court held that the due process clause does not prevent such competition. It pointed out that what the private company was actually seeking, as are respondents here, is insulation from competition, and the due process clause does not provide such protection.

"The injury, which appellant fears may result, is the consequence of competition by the city, and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. The argument that some way must be found to interpret the due process clause so as to preclude the danger of such an injury fails to point the way. Legislation may protect from the consequences of competition, but the Constitution does not. Helena Water Works Co. v. Helena, supra; Vicksburg v. Henson, 231 U.S. 250. The Fourteenth Amendment does not purport to protect property from every injurious or oppressive action by a state,

Memphis Gas Co. v. Shelby County, 109 U.S. 398, 400; St. Louis v. United Railways Co., 210 U.S. 266, 276, nor can it relieve property of congenital defects, Madera Water Works v. Madera, supra, 456. It does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different. Those were risks which appellant took when it entered the field. No articulate principle is suggested calling for the conclusion that the appellant is not subject to the same risks because the competing business is carried on by the state in the exercise of a power which has been constitutionally reserved to it from the beginning.

"Such was the decision in Madera Water Works v. Madera, supra, where this Court pointed out that, in the absence of any contract restriction the Fourteenth Amendment does not prevent a city from conducting a public water works in competition with private business or preclude taxation of the private business to help its rival to succeed."

In *Jayne v. City of Detroit*, 348 U.S. 802 (1954), this Court reached the same result in a case involving municipally-owned parking facilities. In that case, the private parking operators filed suit in the Wayne County Circuit Court alleging that Detroit's ordinances providing for construction of off-street parking garages violated, *inter alia*, the due process clause of the fourteenth amendment by creating "unlawful and unfair competition with appellants' parking businesses." (Statement as to Jurisdiction, pp. 5-6.) This argument was rejected on its merits by the Supreme Court of Michigan which treated a prohibition action against the Circuit Court judges as a kind

of demurrer. (Statement as to Jurisdiction, Appendix "A", pp. 25-26.) On appeal to this Court, Detroit relied on *Puget Sound, supra,* and other similar cases. This Court determined that the situation which the Pennsylvania Supreme Court held to deprive respondents of due process of law did not even present a substantial federal question, and the appeal was dismissed for that reason.

In *Gate City Garage v. City of Jacksonville,* 66 So. 2d 653, 660 (Fla., 1953), the Court stated:

> "There may be public hospitals, waterworks, electric light plants, and other enterprises acquired and operated primarily for the benefit of the public and there may also be private hospitals, waterworks, and electric light plants operated primarily for private profit and private gain. When the Legislature authorizes a particular undertaking, such as, the parking system involved in this case, and it is found and determined that such system primarily serves a public and municipal purpose, it is not a valid objection that the municipality will be engaged in competition with private business. . . .
>
> "We find no provision of the State or Federal Constitutions which prohibits a municipal corporation to acquire, own and operate a system such as that involved in this case because it may be in competition with private individuals, firms and corporations."

See also, Bowman v. Kansas City, 361 Mo. 14, 233 S.W. 2d 26 (1950), also sustaining the right of the city to establish parking garages that compete with private industry.

As indicated by this Court in *Puget*, the private operator would be in the same situation if there were no tax at all, and the public operation were run at a loss and subsidized with public funds. The majority below admits that a high rate per se cannot invalidate a tax. *Puget* holds clearly that competition from a public body does not warrant relief to a private operator. The tax is proper; competition is proper. The majority below holds that two rights make a wrong.

C. Requiring Government Either To Forego Levying Taxes or To Forego Providing Services in the Myriad Areas Where Government and the Private Sector Compete Will Be Disastrous

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The decision below is not only inconsistent with the holdings of this Court, but it is also profoundly inconsistent with the structure of government as we know it. The decision below, if allowed to stand, threatens to destroy the ability of government to serve the public.

The consequence of the holding below is to deny public bodies the right to provide badly-needed services in areas where the private sector is involved, unless government forfeits its right to tax the private sector.

Can it be that in an area where government-supported public transit exists and necessarily competes with private bus, street railway, taxi, and railroad companies, as well as private parking garages and lots, a governmental body may no longer levy the rate of tax its legislature finds necessary for it to discharge its obligations?

Likewise, where the government provides low cost housing, must it compensate all landlords whose competitive position has declined? Although privately-owned airports seldom have the resources sufficient to construct runways large enough for jet airplanes, does the building of a government-operated airport prevent taxation of private airports? Must government forego taxation of private ferry operators at the rate it deems necessary, when it builds a bridge? Is a state constitutionally forbidden to tax a private school because it operates a public school system? The list can be multiplied endlessly. Under the decision below, government will be required either to forego levying taxes or to forego providing services in such areas as: utility services, including electricity, water, sewage, and garbage disposal; recreational services such as municipal stadiums, parks, swimming pools, golf courses, ski slopes and cultural programs; and educational services and facilities of all types.

It is respectfully submitted that competition between government and the private sector permeates our society. It has existed, particularly in education, almost since the founding of the country. To require government to forego taxation of private persons at the rate its legislative body deems wise merely because it is in competition with the taxpayer will cripple government.

D. The Decision Below Violates the Separation of Powers Doctrine, With Dire Consequences for Judicial Caseloads

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If allowed to stand, the holding of the court below, in addition to depriving one of our hard-pressed urban

areas of millions of dollars of needed revenue and causing a chilling effect on government activities, will also create a devastating crisis in the courts. At a time when this Court and most courts throughout the country are inundated with work, the court below would abjure the wisdom of Chief Justice Marshall and open up the floodgates to a possible tidal wave of litigation attacking taxes as being too high.

In *McCulloch v. Maryland*, 4 Wheat. 316, 428 (1819), Chief Justice Marshall, for the Court, stated:

> "[T]he power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.
>
> "The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse."

Justice Eagen in his dissent (A. 34a) has properly condemned this intrusion on legislative power:

> "The most troublesome aspect of the rationale adopted by the majority opinion is that by considering

the tax rate, it is taking on a non-judicial function, and in effect sitting as a legislative body. This approach strikes at the heart of the principle of separation of powers and is, therefore, contrary to constitutional doctrine. The sum and substance of the majority's opinion is: the tax rate is too high for the garage owners to make a substantial profit; hence, the tax is unjust and must be struck down. However, the wisdom of a tax rate is strictly for the legislative branch, and for this Court to strike a tax down because of a high rate is to usurp a legislative power. Moreover, by so doing this Court has to go beyond its own power and exercise the usurped power in an arbitrary fashion by substituting its concept of public policy, or wisdom, for that of the Legislature."

If other courts follow the example of the court below,[7] it is difficult to see an end to the litigation that would be engendered. If there is one thing upon which practically all Americans can agree, it is that taxes are higher than they would like them to be. If this visceral reaction can be translated into lawsuits requiring courts to determine whether taxes are too high, the courts will have time for little else.

Since *McCulloch v. Maryland, supra,* this Court has been steadfast in preventing judicial encroachment upon the legislative power to tax. In *Veazie Bank v. Fenno, supra,* this Court held:

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[7] The case has received wide publicity, being reported at 42 LW 2062, and being the subject of an article in the Wall Street Journal of July 11, 1973. Probably hundreds of municipalities impose parking taxes, while themselves operating parking facilities. In addition, there are the myriad ways noted above in which governmental and private operations compete.

> "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

See also, McCray v. United States, 195 U.S. 27 (1904) and *Fox v. Standard Oil Co.,* 294 U.S. 87, 89 (1935), in the latter of which Justice Cardozo noted:

> "When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers."

This Court stated in *Stewart Dry Goods Co. v. Lewis,* 294 U.S. 525 (1935) at 563:

> "Once the lawfulness of the method of levying the tax is affirmed, the judicial function ceases." 294 U.S. at 563.

It is respectfully submitted that the court below has erred in extending the judicial function far beyond the limits set by this Court. In so doing, it makes the courts into the "super-legislatures" which this Court has often held they should not be. *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965). Petitioner urges this Court to grant the writ of certiorari to restore the proper balance between the judicial and the legislative branches of government.

II. ASSUMING ARGUENDO THAT A HIGH TAX RATE COMBINED WITH COMPETITION FROM THE TAXING BODY COULD IN A PROPER CASE BE CONSIDERED CONFISCATORY, PLAINTIFFS HAVE NOT PROVEN CONFISCATION HERE

Viewing the record in a light most favorable to respondents, we find that they have proved only one thing —unprofitability [8] for a six-month period and a projected unprofitability for six months more. Under no circumstances can mere unprofitability be considered a confiscation of respondents' property.

The majority below admits that, to prove confiscation, a party must ordinarily show both that the industry is being forced out of business and that the tax cannot be passed on to the customer. The first test was met here, says the majority, and the second, if not met directly, was satisfied inferentially because with the competition from the allegedly lower-priced "taxing body", an increase in

[8] As Justice Pomeroy noted in footnote 6 (A. 43a), respondents' evidence on unprofitability is most suspect. He states, among other things, that respondents' "expert" witness was an electrical engineer, that there was no showing of what respondents' net profits were (see Finding No. 18, A. 89a), and that there was no showing of what portion of the operating expenses were salaries to the owners and what portion of the salaries really represented return on investment. This apportionment would be significant, as seven of the twleve respondents are owned or controlled by one man, John T. Stabile (R. 212a).

Other portions of the Record also cast great doubt on the unprofitability of respondents' operations. For example, the chancellor found (Finding No. 17, A. 89a) that some of respondents' garages were not included in Exhibit No. 1, and thus that the projection was distorted.

rates by respondents would simply have increased the disparity between their rates and those of the "taxing body."

Justice Pomeroy pointed out in dissent (A. 41a) that a review of the record will show clearly that neither of these conclusions is supported by the evidence. This Court noted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), that its duty is not limited to the elaboration of constitutional principles, but it also must in proper cases review the evidence to see that those constitutional principles have been constitutionally applied. In *Fiske v. Kansas*, 274 U.S. 380, 385-6 (1927), this Court stated:

> "[T]his Court will review the findings of fact by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

Such is the situation here.

Consider first the majority's conclusion that the tax was forcing respondents out of business. The most obvious refutation of this is the fact that none of the respondents was out of business at the time of trial (A. 98a) and all are still in business (A. 43a). Moreover, even if respondents had gone out of business, the parking tax could not have been the cause. Respondents' receipts, *after the tax*, have either increased or remained stable when the tax rate was increased, higher labor costs and other operating expenses being the cause of respondents' predicament. The fact that many in this industry allegedly cannot make a profit for a short period of time proves nothing. Many industries are in a like situation, and a 5% increase in a gross receipts tax surely cannot be the culprit for all of them.

The majority below erred grievously in determining that the competition of the taxing body prevents the tax from being passed on to the consumer. In the first place, Ordinance No. 704 of 1969 by its terms imposes the tax on the Parking Authority, and at the time of trial, the Parking Authority was paying the tax.[9]

It is true that the Authority is exempt from real estate taxes and can borrow money at lower rates than can respondents.[10] This advantage is common to every gov-

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[9] As set forth in footnote 9 (A. 21a) of the majority opinion, the Court of Common Pleas of Allegheny County has ruled that the Parking Authority is exempt from this tax. *Public Parking Authority of Pittsburgh v. City of Pittsburgh*, No. 687 July Term, 1972. An appeal by the City is pending.

It should be noted that the Authority has always acknowledged its liability for the tax, was joined as a party plaintiff without its permission, and filed a petition to strike it as a named plaintiff. The real plaintiffs in the case are some of the same parties as the respondents in this case.

Thus, respondents' lament that they are unable to raise their rates because of competition from the Parking Authority which need not pay the parking tax, even if true, is the classic definition of *chutzpah*: the man who, having murdered his parents, begs mercy from the court because he is an orphan.

Any harm resulting to respondents from the Parking Authority's not paying this tax is self-inflicted. For the Parking Authority to pay the tax to the City is not a mere paper transaction as the court below states (A. 21a). As noted previously, the Parking Authority is a separate entity from the City of Pittsburgh, which is the taxing body. The Authority has fiduciary obligations to its bondholders, and is obliged to maximize its income so as to pay its bonds.

[10] It is also true, however, that the real advantages of the Authority garages is that they are more convenient, resulting in

ernmental operation and consistent with the equal protection clause of the fourteenth amendment, *Puget Sound Co. v. Seattle, supra.* The extent of this advantage translated into parking rates, nowhere appears in the record.[11]

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higher patronage, and more efficient, being self-service whereas most of respondents' operations are attendant-operated, with resulting higher labor costs. At R. 660a, the study made for the Parking Authority states:

> "Self-parking characterizes the Authority garages, while the other public facilities continue to be almost entirely attendant-operated."

Thus respondents' statement in their Answer to Petition for Reargument below that "the City's allegation, at page 5 of its Petition for Reargument, that the Public Parking Authority's rates are lower because its garages are self-service is likewise entirely without basis on the record" is absolutely incorrect.

[11] In fact, the record shows that, while some of the Authority rates are lower than respondents, some are higher. The majority is simply incorrect in its assertion that Authority rates are lower.

In at least five places in the majority opinion, Justice Roberts refers to the "lower rates" of the Parking Authority. In particular, the opinion notes (A. 14a):

> "For example, the record establishes that the average all day rate for the Public Parking Authority is about $2.00, while the average all day rate for private operators is approximately $3.00."

Justice Roberts used this alleged disparity in rates to show the inability of the operators to pass the tax on to the patrons (A. 17a):

> "Clearly if the private parking lot operators attempted to pass the full burden of the tax on to the consumers they would only succeed in increasing the disparity in the already disparate rates. For example, at the all day rates shown in the record, if appellants were to attempt to pass the tax on to their patrons, their rates would increase from an average

Yet even if Authority rates were consistently lower than respondents', they would not prevent respondents from passing the incidence of the tax on to consumers. As pointed out in Part III of Justice Pomeroy's dissent (A. 46a), the majority ignores elementary economics. It is undisputed that there is an unsatisfied demand for 4100 parking spaces in downtown Pittsburgh (A. 47a; 87a; R. 641a). Respondents' own Exhibit 11, Table 4, shows that facilities open to the public in the central business district, exclusive of Authority garages, are 99.2% occupied at 2:00 p.m. on a typical weekday, and all facilities open to the public, including Authority garages, are at that time 102.9% occupied. Justice Pomeroy succinctly states (A. 47a):

> "... an entrepreneur (the appellants) who controls 71% of the supply in a market of unsatisfied demand need not concern himself with a low-cost competitor (the Parking Authority) who controls 29% of the supply, has no excess capacity, and can-

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of $3.00 to $3.60, while a similar tax pass-on by the Public Parking Authority would increase their average rate from $2.00 to $2.40. Thus the differential in rates would increase from $1.00 to $1.20."

The fact is, however, that the assertion that the all-day rate is $2.00 for the Authority and $3.00 for the private operators is nowhere supported by the record, and is simply incorrect. *The record reveals that the Authority's all-day rate is higher than the private operators!* Respondents' own expert testified that the Authority's average nine-hour rates were $2.56, compared with $2.37 for private operators. (R. 341a). Since most parkers in the downtown area park for long periods of time, the average being close to six hours (R. 615a), the Parking Authority garages are more expensive for the bulk of consumers.

not service demand which the 71% competitor might drive away through price increases."

* * * * * * * *

"The presence of the Parking Authority in this picture, and its preferred status in terms of property taxes, is therefore in my view an irrelevant factor."

The actual experience of the industry supports the economic analysis above. General rate increases in the past have always resulted in an increase in gross receipts (A. 45a). The City experienced only a temporary reduction in the number of cars parked at its facility on the Wharf after it doubled its price for parking. Moreover, as can be seen from the Appendix to Justice Pomeroy's opinion (A. 49a), current rates are significantly higher than those which respondents sought to characterize as profit-maximized. Reality corresponds with theory: the Parking Authority cannot and has not prevented respondents from passing tax increases on to consumers.

Therefore, even if we accept the argument that a high rate plus public competition constitutes a denial of due process, that situation does not exist here.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the decree of the Supreme Court of Pennsylvania.

Respectfully submitted,

GRACE S. HARRIS,
Special Assistant City Solicitor

Of Counsel:
RALPH LYNCH, JR.,
City Solicitor

In the Supreme Court of the United States

October Term, 1973
No. 73 582

CITY OF PITTSBURGH, *Petitioner*

vs.

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPPARD, JR., t/a Stanwix Auto Park; JOHN COMINOS, t/a Liberty Parking; JOHN STABILE and ROCCO A. DEL SARDO, t/a Wm. Penn Parking Lot; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING—CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Respondents

APPENDIX TO PETITION OF THE CITY OF PITTSBURGH FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

GRACE S. HARRIS,
Special Assistant City Solicitor,
313 City-County Bldg.,
Pittsburgh, Pa. 15219,
Attorney for Petitioner.

Of Counsel:
RALPH LYNCH, JR.,
City Solicitor.

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840
Harry Haas, Pittsburgh Representative, Tel. 421-4723

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APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

No. 90 March Term, 1973

Alco Parking Corporation; Arena Parking, Inc.; Campus Parking, Inc.; Fourth Avenue Parking, Inc.; Grant Parking, Inc.; Harry W. Sheppard, Jr., t/a Stanwix Auto Park; John Cominos, t/a Liberty Parking; John Stabile and Rocco A. Del Sardo, t/a Wm. Penn Parking Lot; K-Seven Parking Company; Meyers Bros. Parking-Central Corp.; Parking Service Corporation, Inc.; Wm. Penn Parking Garage, Inc.,

Appellants

v.

City of Pittsburgh

Appeal from Decree of the Court of Common Pleas of the County of Allegheny, Pennsylvania at No. 1699 April Term, A.D. 1970 and the Order of the Commonwealth Court of Pennsylvania at No. 643 C.D., 1971.

OPINION OF THE COURT

Opinion by Mr. Justice Roberts, July 2, 1973:

This controversy presents the interesting and novel question of whether the enactment, by a municipal gov-

ernment, of a 20 percent gross receipts tax upon all non-residential, commercial parking facilities in that municipality, combined with direct governmental competition in the form of a public parking authority, charging lower rates, has resulted in an unconstitutional taking and confiscation of private property without due process of law.

Appellants are twelve owners and operators of parking lots and garages representing approximately 71 percent of the total commercial parking spaces in downtown Pittsburgh. On February 20, 1970, appellants filed a complaint in equity in the Allegheny County Court of Common Pleas seeking to restrain the City of Pittsburgh (appellee) from enforcing the provisions of Ordinance No. 704 (Parking Tax Ordinance), and seeking a refund of all taxes paid thereunder. The Parking Tax Ordinance, approved by the Pittsburgh City Council on December 31, 1969, and enacted pursuant to the Local Tax Enabling Act, Act of December 31, 1965, P. L. 1257, §§1 et seq., 53 P.S. §§6901 et seq., imposed a tax of 20 percent on the gross receipts of all non-residential commercial parking transactions within the city limits.

This Parking Tax Ordinance (No. 704) superseded and replaced Ordinance No. 675, enacted by the City of Pittsburgh in 1968 establishing a gross receipts tax of 15 percent on all non-residential commercial parking transactions in the city. Ordinance No. 675, in turn, had replaced Ordinance No. 434, which had originally established the gross receipts tax rate of 10 percent.

In their complaint in equity appellants asserted (1) that the Parking Tax Ordinance was so excessive and unreasonable that it amounted to a confiscation of appellants' property without due process of law, and (2) that

the Ordinance violated Article VIII, Section 1 of the Pennsylvania Constitution,[1] and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in that the city had no reasonable basis for separately classifying appellants' commercial parking operations for the purpose of taxation. After a trial the Allegheny County Court of Common Pleas issued a Decree Nisi, on March 19, 1971, dismissing appellants' complaint, having found no taking of property without due process, and no violation of either the Pennsylvania or the United States Constitutions. Appellants' timely filed exceptions to the decree were dismissed by the court en banc on July 11, 1971, whereupon a final decree was entered.

Appellants then appealed to the Commonwealth Court which affirmed the decree of the common pleas court on June 8, 1972, by a vote of four to three. Appellants' petition for reargument was granted by the Commonwealth Court on June 29, 1972. However, after reargument the Commonwealth Court adhered to its prior decision, affirming the chancellor's decree on October 10, 1972. Subsequently, on November 6, 1972, appellants filed a petition for allowance of appeal with this Court. That petition was granted on January 23, 1973. We now reverse and remand.

I.

Appellee, the City of Pittsburgh, contends, initially, that this Court lacks jurisdiction to hear this appeal be-

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[1] "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax and shall be levied and collected under the general laws." Constitution of Pennsylvania, Article VIII, Section 1.

cause appellants' petition for allowance of appeal was not timely filed. See *Nardo v. Smith*, 448 Pa. 38, 292 A. 2d 377 (1972). Consequently appellee has moved to quash this appeal. In its motion to quash appellee alleges that appellants' petition for allocatur was not filed until November 6, 1972, almost five months after the issuance of the final order and opinion of the Commonwealth Court of June 8, 1972—clearly not within the 30-day time limit for perfecting an appeal as provided by statute. See Act of July 31, 1970, P. L. , art. V, §502, 17 P.S. §211.502 (Supp. 1972).

Appellee's contention is that the grant of the petition for reargument by the Commonwealth Court on June 29, 1972 (within the 30-day appeal period), unless accompanied by an order staying the proceedings, does not toll the 30-day period within which appellants must file their appeal. See *Francis v. J. A. Brashear M. School Dist.*, 435 Pa. 589, 258 A. 2d 509 (1969); *Smith v. Jones*, 369 Pa. 13, 85 A. 2d 23 (1951); *Erie v. Piece of Land*, 341 Pa. 310, 17 A. 2d 399 (1941). Since no such specific stay of the proceedings was issued by the Commonwealth Court, appellee asserts that the time for perfecting the appeal expired 30 days after the original June 8, 1972 order of the Commonwealth Court, regardless of that court's grant of reargument within the 30-day period.

Appellants contend that in good faith, after reargument had been granted, they contacted the Prothonotary of the Supreme Court who advised them that a petition for allocatur should not be filed until after the Commonwealth Court's order, following reargument, had been entered. Relying upon this information appellants did not file their petition until November 6, 1972—a date within

30 days of the Commonwealth Court's order, after reargument, affirming the decree below.

While appellants may not have been justified in relying on the legal advice of a court official, nevertheless the rule of law urged upon this Court by the appellee is not only contrary to logic but to the laws of physics as well. The granting of a petition for reargument within the 30-day appeal period necessarily indicates an intention by the granting court to stay the proceedings, and is in reality such a stay, in order to keep the record before that court, during reargument, pending any change or modification of the court's initial order after reargument. In these circumstances to require appellants to file a petition for allowance of appeal within 30 days of the original order of the Commonwealth Court would have the effect of placing them in two courts at the same moment. It is legally and physically impossible for the record in any case to be pending before two separate appellate courts of this Commonwealth simultaneously. Indeed, a reargument is clearly a reconsideration by a court of a particular case. To slavishly adhere, as the appellee insists, to a rule requiring a court to also issue an order staying the proceedings would be needlessly elevating mere form over substance.

Certainly it is illogical, as well as senseless, to require a litigant to file an appeal, or petition for allowance of appeal, to a second appellate court while his case is still pending before the first appellate court, about to reconsider his case. To compel him to do so in advance of the reargument is indeed a useless, wasteful, and premature procedure. Assuming the court's initial decision is reversed upon reargument, the litigant may not even desire

to file an appeal at the later time. If an appeal is desired after the reargument, that is the appropriate time for setting the appeal procedure in motion. This Court will not mandate such a purposeless burden and expenditure of professional and judicial time and effort.

These considerations lead us inexorably to the conclusion that where, as here, the Commonwealth Court granted appellants' petition for reargument within the prescribed period, the proceedings were thereby stayed, pending a reconsideration upon the merits after reargument. Appellants' petition, filed within 30 days of the Commonwealth Court's post-reargument disposition, was therefore timely. The motion to quash the appeal is denied. To the extent that any prior decision of this Court are inconsistent with this holding they are no longer controlling.

II.

Appellee urges upon this Court, one additional procedural objection contending that the Allegheny County Court of Common Pleas sitting in equity was not the proper court to hear this case. Appellee urges that a proceeding in equity is only proper in challenges to taxing statutes or ordinances when there is "a substantial question of constitutionality . . . and the absence of an adequate statutory remedy." *Rochester and Pittsburgh Coal Co. v. Indiana County Board of Assessment*, 438 Pa. 506, 266 A. 2d 78 (1970).[2] The City of Pittsburgh argues

[2] Even if appellee could raise this issue here for the first time (see text, p. a, infra), its reliance upon *Rochester and Pittsburgh Coal Co. v. Indiana County Board of Assessment*, 438 Pa. 506, 266 A. 2d 78 (1970), appears to be somewhat misplaced. The

that the issues raised by appellants are not "substantial constitutional questions" and that appellants had a specific statutory remedy of which they failed to avail them-

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seminal case on the question of equity jurisdiction to hear challenges to tax legislation under the Local Tax Enabling Act, (Act of December 31, 1965, P. L. 1257, §6, as amended, 53 P.S. §6906), is *Lynch v. Owen J. Roberts School District*, 430 Pa. 461, 244 A. 2d 1 (1968). In *Lynch* this Court held that while normally equity is without jurisdiction to enjoin enforcement of a tax not challenged at law under the applicable statute, an exception exists "where a taxing statute is made the subject of a *constitutional* challenge." Id. at 465, 244 A. 2d at 3.

Rochester, decided two years later, apparently effected a sub silentio modification of *Lynch* by holding that equity only has jurisdiction when there is "a substantial question of constitutionality (and not a mere allegation) and the absence of an adequate statutory remedy." *Rochester*, supra at 508, 266 A. 2d 79. However, *Rochester* appears to have distinguished itself as sui generis. The majority there acknowledged that a different rule was necessary because, unlike *Lynch*, *Rochester* involved a real estate tax. The majority felt in those real estate tax situations it would be preferable for an administrative body with some expertise, such as the board of assessment, to assume jurisdiction rather than an equity court. *Rochester*, supra at 509, 266 A. 2d at 79.

Moreover, in *Crosson v. Downington Area School District*, 440 Pa. 468, 475, 270 A. 2d 377, 380 (1970), this Court, while not returning completely to the preferable rule of *Lynch*, at least modified *Rochester* in holding that even "'[w]here there is an adequate remedy at law in this class of use, this Court has repeatedly said that *Equity should intervene only where there is . . . an* utter disregard of imperative constitutional requirements: [citations of authorities].'" (Emphasis in original.) See also *Campbell v. Coatesville Area School District*, 440 Pa. 396, 270 A. 2d 385 (1970).

selves. See Local Tax Enabling Act, Act of December 31, 1965, P. L. 1257, §6, as amended, 53 P.S. §6906.[3]

However, appellee did not raise this issue below and may not raise this issue here for the first time. The record clearly discloses that appellee interposed no objection to the propriety of the equity court proceeding either prior to, during, or after the trial below. In fact, one of the chancellor's express conclusions of law, to which appellee took no exception was: "This court sitting in equity has jurisdiction of the parties and of the subject matter of this proceeding." This Court has repeatedly emphasized, and it is now beyond cavil, that "we will not review questions

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[3] It is not altogether clear that appellants could have proceeded under Section 6 of the Local Tax Enabling Act even had they so attempted. That section of the Act provides in pertinent part that: "No tax levied for the first time by any political subdivision to which this act applies shall go into effect until thirty days from the time of the adoption of the ordinance or resolution levying the tax. Within said thirty days, taxpayers representing twenty-five percent or more of the total valuation of real estate in the political subdivision as assessed for taxation purposes, or taxpayers of the political subdivision not less than twenty-five in number aggrieved by the ordinance or resolution shall have the right to appeal therefrom to the court of quarter sessions of the county upon giving bond with sufficient security in the amount of five hundred dollars ($500), approved by the court, to prosecute the appeal with effect and for the payment of costs." Act of December 31, 1965, P. L. 1257, §6, as amended, 53 P.S. §6906.

Certainly it is arguable whether Ordinance No. 704 merely raising the rate of a gross receipts tax already in existence since 1962, can be classified as "a tax levied for the first time," under the terms of this section. Secondly, assuming appellants in good faith were unable to muster the requisite 25 aggrieved taxpayers, they were then apparently foreclosed from challenging the tax under this statute and arguably had no statutory remedy.

that were neither raised, tried, or considered in the trial court." *Felte v. White,* Pa. , A. 2d (1973); *Heppe Estate,* 440 Pa. 328, 269 A. 2d 687 (1970); *Man O'War Racing Ass'n Inc. v. State Horse Racing Commission,* 433 Pa. 432, 250 A. 2d 172 (1969); *Brenner v. Sukenik,* 410 Pa. 324, 189 A. 2d 246 (1963); *Clark v. Rutecki,* 408 Pa. 25, 182 A. 2d 687 (1962); *Bechler v. Oliva,* 400 Pa. 299, 161 A. 2d 156 (1960); *Rosenfeld v. Rosenfeld,* 390 Pa. 39, 133 A. 2d 829 (1957).

III.

Proceeding to the merits of the case, appellants attack the constitutionality of the Parking Tax Ordinance on two grounds. They first contend that the Ordinance violates both the uniformity clause of the Pennsylvania Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Specifically appellants assert that the Ordinance "constitutes an arbitrary use of the taxing power by [Pittsburgh] City Council in that the imposition of a separate tax on the parking business, in additional to its regular taxes, lacks *any reasonable basis.*" Moreover, appellants contend that merely because the City could, under its police power, classify the parking business separately for regulatory purposes, it does not necessarily follow that they can separately classify the parking business for purposes of taxation.

This argument, presented to and rejected by this Court on numerous prior occasions, must, once again, be rejected. It is well-established that the Commonwealth and its political subdivisions, in the exercise of the taxing power, are subject to the requirements of equal protection

and uniformity. See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S. Ct. 437 (1959); *Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370, 214 A. 2d 209 (1965). However, the taxing authority must by necessity possess wide discretion for purposes of taxation of various businesses or occupations. *Commonwealth v. Life Assurance Co. of Pa.*, supra at 376, 214 A. 2d at 214, and the cases cited therein.

In *Life Assurance Co.*, supra, this Court noted:

"The equal protection clause imposes no iron rule of equality prohibiting that degree of flexibility and variety appropriate to reasonable schemes of taxation. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 525, 79 S. Ct. 437, 440 (1959).

"The only constitutional limitation placed upon the power of the Legislature to distinguish between various entities for purposes of taxation is that their basis for doing so be reasonable. See *Allied Stores of Ohio, Inc. v. Bowers*, supra, at 527, 79 S. Ct. at 441; *State Bd. of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537, 51 S. Ct. 540, 543 (1931); *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 572, 30 S. Ct. 578, 580 (1910); *Jones & Laughlin Tax Assessment Case*, 405 Pa. 421, 433-34, 175 A. 2d 856, 862 (1961); *Commonwealth v. Lukens*, 312 Pa. 220, 223, 167 Atl. 167, 169 (1933). And the burden of showing that the classification employed by the Legislature is not reasonable is upon the party attacking the tax. *Cf. Chartiers Valley Jt. Schools v. Allegheny County Bd. of School Dir's*, 418 Pa. 520, 546, 211 A. 2d 487, 501 (1965). 'Especially is this so in light of the often reaffirmed rule that . . . " '[legislation] will not be de-

clared unconstitutional unless it *clearly, palpably* and *plainly* violates the Constitution.'"' *Ibid.* (Citations omitted.)" Id. at 376-77, 214 A. 2d at 214.

Moreover, the burden of proving the classification is unreasonable is a heavy one. *Amidon v. Kane,* 444 Pa. 38, 51, 279 A. 2d 53, 60 (1971); *F. J. Busse Co. v. Pittsburgh,* 443 Pa. 349, 359, 279 A. 2d 14, 19 (1971); *Philadelphia v. Depuy,* 431 Pa. 276, 279, 244 A. 2d 741, 743 (1968). "So long as the classification imposed is based upon some standard capable of reasonable comprehension, be that standard based upon ability to produce revenue or some other legitimate distinction, equal protection of the law has been afforded." *Commonwealth v. Life Assurance Co. of Pa.,* supra at 378, 214 A. 2d at 215. Merely because "a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy. *American Sugar Refining Co. v. State of Louisiana,* 179 U.S. 89, 21 S. Ct. 43." *Allied Stores,* supra at 528, 79 S. Ct. at 441. Thus a tax based on a reasonable classification is not unconstitutional because one class may be placed at a competitive disadvantage. *Williams and Co., Inc. v. Pittsburgh School District,* 430 Pa. 509, 514, 244 A. 2d 37, 39 (1968).

The determinative question, then, is whether the classification imposed by the Parking Tax Ordinance is a reasonable one. We said in *Commonwealth v. Life Assurance Co. of Pa.,* supra at 378-79, 214 A. 2d at 215 that: ". . . the essential question in testing the validity of such measures . . . is whether the distinctive treatment accorded rests upon substantial differences between the subjects so classified. . . . And where such distinctions

rest upon differences recognized and acted upon by the business world, it is not within the province of the courts to intrude. . . . So long as the classification is neither capricious nor arbitrary, there is no denial of the equal protection of the law. . . ." (Citations omitted.)

This Court has in the past sustained numerous types of distinctive tax treatment of a wide diversity of businesses and occupations. See, e.g., *Commonwealth v. Lafferty*, 426 Pa. 541, 233 A. 2d 256 (1967) (contract carrier taxed differently from common carrier although engaged in similar enterprises); *Allentown School District Mercantile Tax Case*, 370 Pa. 161, 87 A. 2d 480 (1952) (retailers and wholesalers taxed differently); *DuFour v. Maize*, 358 Pa. 309, 56 A. 2d 657 (1948) (strip mining of coal taxed differently than deep mining of coal). Moreover, in 1940, this Court sustained the validity of a Philadelphia ordinance which distinguished open parking places from closed garages for the purpose of taxation. *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940); see also *McGillick v. City of Pittsburgh*, 415 Pa. 581, 203 A. 2d 481 (1964); *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941).

Commercial parking lots are without question a proper subject for local, municipal taxation. The City of Pittsburgh has decided, not without reason, that commercial parking operations should be singled out for special taxation to raise revenue because of traffic related problems engendered by these operations. This Court cannot say that placing such businesses in a separate taxable class is, ipso facto, an action so devoid of any reasonable basis as to constitute a violation of either the equal protection clause of the United States Constitution or the

uniformity clause of the Pennsylvania Constitution.[4] ". . . [W]here the state seeks to raise revenue, it need not justify any distinction drawn between the taxed and nontaxed with respect to the raising of revenue so long as some other reasonable basis for treating the various classes differently exists. Where such distinction exists, the wisdom of the legislative policy of taxing one class and not another is not a matter for the courts. 'Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and an earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.' *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U.S. 549, 569, 31 S. Ct. 259, 263 (1911)." *Commonwealth v. Life Assurance Co. of Pa.*, supra at 377-78 n. 11, 214 A. 2d at 215 n. 11.

IV.

Appellants' second avenue of attack is that the Parking Tax Ordinance, coupled with direct economic competition by the Public Parking Authority, created with

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[4] In *Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370, 241 A. 2d 209 (1965), we held that the standards of the uniformity clause and of the equal protection clause are identical. The standard for uniformity under the Pennsylvania Constitution was further explicated in *P. J. Busse Co. v. Pittsburgh*, 443 Pa. 349, 279 A. 2d 14 (1971). There this Court said that the "test of uniformity is whether there is a reasonable distinction and difference between the classes of taxpayers sufficient to justify different tax treatment." Id. at 358, 279 A. 2d at 19. See *Amidon v. Kane*, 444 Pa. 38, 46-48, 279 A. 2d 53, 58-59 (1971).

public funds (see *Price v. Philadelphia Parking Authority*, 422 Pa. 317, 335, 221 A. 2d 138, 148 (1966)), violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Specifically appellants maintain that the ordinance imposes a rate so excessive and unreasonable in light of the direct governmental competition, that it amounts to a confiscation of property without just compensation. Because of the alleged excessive and unreasonable rates, in these circumstances, appellants assert that the vast majority of parking lot owners and operators can no longer afford to remain in business. Additionally they argue that even those owners who are still not operating at a loss are not earning a reasonable return. This complete inability to earn a reasonable return on investments is allegedly due to the combined effects of the 20 percent gross receipt tax and the competition from the Public Parking Authority, which charges lower rates. For example, the record establishes that the average all-day rate for the Public Parking Authority is about $2.00, while the average all-day rate for private operators is approximately $3.00.

In support of their contention appellants introduced at trial numerous statistical charts and compilations seeking to establish the unconstitutional impact of the gross receipts tax. A brief summary of this evidence shows the following.

After the imposition of the 20 percent gross receipts tax appellants' projected[5] figures for 1970 show that out

[5] Appellants' statistics for 1970 are based on actual revenues obtained for the first six months of 1970, and projections for the later six months based on revenues for those same months during 1969.

of 14 different parking lot operators in downtown Pittsburgh nine would sustain operating losses. Of the five operators earning a profit only two would achieve a return of one percent or better. The highest return projected for any of the 14 operators in 1970 was 2.9 percent.

Moreover, the evidence produced by appellants indicates that as the gross receipts tax increases from the original ten percent to the present 20 percent the percentage and number of parking lots unable to achieve any profit doubles. Again based on projections for 1970, when compelled to pay the 20 percent gross receipts tax, 65 percent of the individual lots would sustain operating losses. If the tax had remained at 15 percent, only 37 percent of the lots would fail to earn a profit. If the tax was reduced to its original ten percent then only 30 percent of the lots would sustain losses.

The chancellor, upon evaluating the evidence presented, held that appellants had failed to meet their heavy burden of establishing the tax was confiscatory.[6] Therefore, the chancellor concluded the Parking Tax Ordinance was not confiscatory or a taking without due process.[7]

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[6] See *Amidon v. Kane*, 444 Pa. 38, 51, 279 A. 2d 53, 60 (1971); *F. J. Busse v. Pittsburgh*, 443 Pa. 349, 359, 279 A. 2d 14, 19 (1971); *Philadelphia v. Depuy*, 437 Pa. 276, 279, 244 A. 2d 741, 743 (1968).

[7] Among the factors weighed by the chancellor in reaching his determination that the tax rate was not confiscatory were the following.

1. Plaintiffs' statistics failed to include all parking lots in downtown Pittsburgh, serving to distort their financial projection.

2. Plaintiffs' projection failed to compute net profits.

He noted that even though "a few borderline operations may fall by the way" the tax is not necessarily confiscatory. The Commonwealth Court unanimously agreed that the tax was imposed at an unreasonable rate, but the majority concluded that although appellants as a group would sustain an operating loss under the unreasonably high tax, nevertheless "there is no constitutional prohibition of taxation at unreasonable or even confiscatory rates." *Alco Parking v. Pittsburgh*, 6 Pa. Commonwealth Ct. 433, 441, 291 A. 2d 556, 561, aff'd on rehearing, Pa. Commonwealth Ct. , 295 A. 2d 349 (1972). Moreover, the Commonwealth Court also unanimously agreed, contrary to the chancellor's findings, that "appellants' [sic] are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates but also *because the appellants are in competition with a public authority which, exempt from other taxes, can charge less.*" Id. (Emphasis added.)

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3. The demand for parking spaces in Pittsburgh exceeds the supply.

4. None of the plaintiffs have increased their rates since February, 1970.

5. Plaintiffs have not attempted to pass on the increased tax to the parking lot patrons.

Moreover, the chancellor noted that plaintiffs failed to carry their heavy burden of proof that there was no reasonable basis for the tax. Specifically, the evidence revealed that gross receipts remained constant between 1969 and 1970 despite the tax increase; peripheral parking lots still operated at a profit; and plaintiffs' decreased rate of return was due at least in part to increased labor costs as well as increased tax liability.

Finally appellants contended that operating income less than ten percent of total revenues represented a confiscatory rate of taxation. The chancellor held that the court should not be asked to decide the question of what is a reasonable rate of return.

Undoubtedly, if a tax is shown to be confiscatory it is utterly impermissible and a violation of the Constitution. See *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 54 S. Ct. 599 (1933). This Court has been presented with similar allegedly excessive gross receipt taxes on parking lot operations on two prior occasions: *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941); *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940). In both of those instances we held that the evidence presented by the parties attacking the taxing ordinance was insufficient to sustain a claim of confiscation without due process. However, neither case excluded the possibility that, upon a proper showing, a tax could be shown to be confiscatory. In *Samuels* and *Eglin* this Court indicated that two essential elements must exist before a tax can be held to be confiscatory. First the taxpayer must show that more than "an occasional operator cannot afford to continue in business." *Samuels*, supra at 327, 12 A. 2d at 82. Secondly, he must show that the tax cannot be passed on to the consumer. *Eglin*, supra at 144, 19 A. 2d at 845; *Samuels*, supra.

Appellants, on this record, have shown that more than "an occasional operator cannot afford to continue in business". However, the chancellor found that appellants have made no significant attempt to pass the tax on to the consumer. As noted previously the Commonwealth Court was of the unanimous opinion that the tax could not be passed on to the consumer because of the competition from the Public Parking Authority. Clearly if the private parking lot operators attempted to pass the full burden of the tax on to the consumers they would only succeed in increasing the disparity in the already dis-

parate rates. For example, at the all-day rates shown in the record, if appellants were to attempt to pass the tax on to their patrons, their rates would increase from an average of $3.00 to $3.60, while a similar tax pass-on by the Public Parking Authority would increase their average rate from $2.00 to $2.40. Thus the differential in rates would increase from $1.00 to $1.20.

Even if appellants have not fulfilled the dual tests of *Samuels* and *Eglin*, nevertheless neither *Samuels* nor *Eglin* are completely applicable here, because neither case dealt with the precise issue involved in this case. *Samuels* and *Eglin* were disputes involving only one issue—whether a gross receipts tax, *by itself*, imposed a rate so unreasonable as to be confiscatory. The instant case, on the other hand, presents a significantly different and exceedingly more complex question. Here the allegedly excessive and unreasonable tax is combined with direct competition at lower rates from the Pittsburgh Parking Authority.

It is rare for courts to strike down tax legislation because the tax rate imposed is excessive. Very few, if any courts have been willing to void a tax *solely on the basis of an unreasonably high rate*. Thus, in *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 47, 54 S. Ct. 599, 601 (1933), the Supreme Court emphasized that the question of whether a tax is so excessive that it will bring about the destruction of a business is *"a premise which, standing alone*, this court heretofore has uniformly rejected as furnishing no judicial grounds for striking down a taxing act." (Emphasis added.) See *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 562, 55 S. Ct. 525, 530 (1935); *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 48, 41 S. Ct. 219, 220 (1921). In this area courts

have usually deferred to legislative bodies. See *Stewart Dry Goods Co. v. Lewis*, supra; *Fox v. Standard Oil of New Jersey*, 294 U.S. 87, 99, 55 S. Ct. 333, 338 (1935).

However, these same courts have acknowledged that in exceptional circumstances the taxing power of the Legislature may be abused, and, if so, it would violate both the Fifth and Fourteenth Amendments. In *A. Magnano Co. v. Hamilton*, supra, although upholding the constitutionality of a tax on all butter substitutes, the Supreme Court stated: "Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. Brushaber v. Union Pac. R. R., 240 U.S. 1, 24, 36 S. Ct. 236, 60 L. Ed. 493. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. . . . That clause is applicable to a taxing statute such as the one here assailed *only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.* . . . Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses . . . unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state." Id. at 44, 54 S. Ct. at 601 (emphasis added) (citations

omitted.) See *Fox v. Standard Oil Co. of New Jersey*, supra at 100, 55 S. Ct. at 338; *Heiner v. Donnan*, 285 U.S. 312, 326, 52 S. Ct. 358, 361 (1932); *Nichols v. Coolidge*, 274 U.S. 531, 541, 47 S. Ct. 710, 713 (1926); *McCray v. United States*, 195 U.S. 27, 63, 24 S. Ct. 769, 779 (1904).[8]

Moreover, when determining the validity of a tax courts must evaluate the nature and effect of that tax, not merely its name or description. "The substance and not the shadow determines the validity of the exercise of the [taxing] power." *Stewart Dry Goods Co. v. Lewis*, supra at 555, 55 S. Ct. at 527. See *Senior v. Braden*, 295 U.S. 422, 429, 55 S. Ct. 800, 802 (1935).

This Court has heretofore not had occasion to hold a tax to be so excessive and unreasonable as to compel the conclusion that it was not the proper exertion of taxation, but a confiscation of property. However, this Court

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[8] In *McCray v. United States*, 195 U.S. 27, 63, 24 S. Ct. 769, 779 (1904), the Supreme Court admonished that if a legislative power such as the taxing power were abused so as to destroy fundamental rights which no free government could consistently violate, it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution forbade them. "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred." Id. at 64, 24 S. Ct. at 780.

has not previously had presented to it a controversy where the taxing body was in direct competition, as here, with private enterprise and simultaneously imposed a burdensome gross receipts tax on all competitors in that activity (including itself).[9] This is undeniably a "rare and special instance"[10] where the due process clause imposes strict constraints upon the exercise of the legislative taxing power.

As appellants emphasize it is doubtful that the state Legislature ever intended the public parking authorities utilizing public financing advantages, to compete directly with private parking operators in this fashion. In fact, the declaration of policy in the Parking Authority Law of 1947[11] specifically provides: ". . . That it is intended that

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[9] As of this writing, the Allegheny County Court of Common Pleas has ruled that the Public Parking Authority is exempt from payment of the challenged gross receipts tax. *Public Parking Authority of Pittsburgh v. City of Pittsburgh*, No. 687, July Term, 1972. See *Allegheny County v. Moon Township*, 436 Pa. 258 A. 2d 630 (1969). An appeal is presently pending before the Commonwealth Court.

However, whether the Public Parking Authority is subject to the tax seems to make little real difference in the context of this present dispute. Even if the Authority had to pay the tax to the City it would mean only in reality an accounting transaction, transferring dollars from one pocket of an instrumentality of City government to another. Thus although appellants' argument would be strengthened by the common pleas court's decision, we need not presently rest our decision upon *Public Parking Authority of Pittsburgh v. City of Pittsburgh*, supra.

[10] *A Magnano Co. v. Hamilton*, 292 U.S. 40, 44, 54 S. Ct. 599, 601 (1933).

[11] Parking Authority Law, Act of June 5, 1947, P. L. 459, §§1 et seq., as amended, 53 P.S. §§341 et seq.

the authority cooperate with all existing parking facilities so that private enterprise and government may mutually provide adequate parking services for the convenience of the public;" Act of June 5, 1947, P. L. 458, §2, as amended, 53 P.S. §342. Nonetheless, Pittsburgh parking operators are now not only denied the cooperation intended in the statute, but are actually confronted with direct, adverse competition from the Public Parking Authority.

Furthermore, the Public Parking Authority is blessed with certain other legislatively bestowed advantages and able, therefore, to charge lower rates. The Parking Authority is exempt from payment of all real estate taxes because of the exclusion given to public property used for public purposes.[12] Because lower interest rates are granted to municipal corporations seeking to borrow money, the Parking Authority is able to arrange cheaper and longer term financing. This also reduces significantly the rates charged by the Authority, and increases in intensity the degree and nature of its direct competition with the private parking lot operators. It is certainly undeniable that the Parking Authority is able to finance its site and construction costs through the attractive medium of long term, lower interest public financing, with all the benefits which attend such governmental arrangements, not available to private businessmen. See *Price v. Philadelphia Parking Authority*, 422 Pa. 317, 355, 221 A. 2d 138, 148 (1966). It is the combination of these factors which creates the extraordinary competitive advantage

[12] See generally *Allegheny County v. Moon Township*, 436 Pa. 54, 258 A. 2d 630 (1969).

which the Public Parking Authority is able to exert over the non-governmental parking lot owners and operators.

Not only is the Parking Authority able to charge lower rates than private operators, but with the enactment of the 20 percent gross receipts tax the taxing body now appropriates for itself practically all of the earnings of the private parking lot operators. By taking 20 percent of gross revenues "off the top" the City effectively confiscates what were formerly the earnings of the parking lot owners. This confiscation is practically as complete as if the City had condemned without compensation the private lots to erect public facilities.[13] In this situation it is unnecessary for private lot operators to prove that they cannot pass the tax on to their customers (although as previously noted the Commonwealth Court found this was not possible). See *Samuels,* supra; *Eglin,* supra. Clearly by raising their rates the private operators would greatly increase the already significant rate differential between private and public parking lots. The public competition thus effectively prohibits private lot operators from increasing their rates and passing the tax on to their patrons, while the imposed tax appropriates whatever earnings were formerly produced. Where such an unfair

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[13] It is noted that while this appeal was pending before this Court the City of Pittsburgh enacted a Parking Tax Ordinance superseding the present, challenged Ordinance. The new Ordinance was scheduled to take effect April 1, 1973. This new Ordinance provides for the imposition "of a tax of 20 percentum (20%) upon the consideration *paid by the patrons of a non-residential parking place for each parking transaction, to be collected from the patron by the operator* of each such non-residential parking place; . . ." Ordinance No. 30, January 26, 1973 (emphasis added.)

competitive advantage accrues generated, by the use of public funds, to a local government at the expense of private property owners, without just compensation, a clear constitutional violation has occurred.[14]

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[14] See Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964). Professor Sax has suggested a test for determining when just compensation is due private property owners as a result of governmental activity. In Professor Sax's view government interacts with the private sector in two ways. First, government "governs", i.e., "it mediates the disputes of various citizens and groups within the society" and "resolves the conflict among competing and conflicting alternatives." Id. at 62. Secondly, government acts in an enterprise capacity in which it acquires economic resources for its own account and thereby competes with private industry. Id.

Professor Sax states that: ". . . when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power." Id. at 63.

More specifically he adds: ". . . when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.

"To be sure, the acquisition of title or the taking of physical possession will be present in the great majority of taking cases under this theory. But—and this is the important point—the presence or absence of a formal title-acquisition and/or invasion will never be conclusive. These formalities are not necessarily present when the government, as an enterpriser, is acquiring resources for its own account." Id. at 67.

This is admittedly a case of first impression in this Commonwealth. Traditionally governmental activities held to be unconstitutional takings of property without due process of law are restricted, for example, to the realm of zoning and eminent domain. However, no reason has been suggested why unconstitutional takings must necessarily be restricted only to this segment of the law. Indeed, this Court has held that "a 'taking' is not limited to an actual physical possession or seizure of the property;

Such an approach is indeed logical, and facilitates our analysis here. Clearly the City of Pittsburgh is acting in an enterprise capacity by operating a publicly financed parking lot which competes with private industry. To the extent that the Public Parking Authority has gained an unfair competitive edge over private parking lot owners through tax exemptions and lower rates, and more importantly appropriated an unreasonable proportion of their revenues via the gross receipts tax, a taking requiring just compensation has occurred. In the absence of any compensation a taking without due process of law results.

Applying a similar rationale to *Hasegawa v. Maui Pineapple Co.*, Haw. , 475 P. 2d 679 (1970), the Supreme Court of Hawaii invalidated a statute requiring private employers to pay their employees any wages they may have lost as a result of service on a jury or a public board or commission. The Court there stated: "In enacting HRS §388-32 the legislature attempted to shift to private employers some of the cost of running the public enterprises of juries and public boards and commissions. In this case money, instead of realty, is being taken for a public use. However, we see no difference between the taking of money to pay public employees and the taking of realty to house government institutions. *In both instances, the State is seeking to enhance the economic value of a government enterprise at the direct expense of a particular individual or group. This is precisely the kind of government 'taking' which requires just compensation.*" Id. at , 475 P. 2d at 684 (footnote omitted) (emphasis added).

if the *effect* of the zoning law or regulation is to deprive a property owner of the lawful use of his property it amounts to a 'taking', for which he must be justly compensated:" *Cleaver v. Board of Adjustment,* 414 Pa. 367, 372, 200 A. 2d 408, 412 (1964) and cases cited therein.

Moreover, in determining what is a taking this Court may not allow form to prevail over substance. As the Supreme Court noted, "The substance and not the shadow determines the validity of the exercise of the power." *Stewart Dry Goods Co. v. Lewis,* supra at 555, 55 S. Ct. at 527. Clearly "whether the government takes title or possession of the subject property is merely a matter of the form in which it chooses to proceed." Sax, Takings and the Police Power, 74 Yale L.J. 36, 46 (1964). Here the City has appropriated most, if not all, the earnings of the private parking lot owners through the imposition of an excessive gross receipts tax. It has also enhanced the detriment to private property owners by creating its own publicly subsidized competition. This governmental enterprise competing with private industry adds not only a new and most significant dimension to the traditional constitutional problem of what constitutes a taking without due process but also an impermissible one.

It must be concluded that the unreasonably burdensome 20 percent gross receipts tax, causing the majority of private parking lot operators to operate their businesses at a loss, in the special competitive circumstances of this case, constitutes an unconstitutional taking of private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

The order of the Commonwealth Court and the decree of the Allegheny County Court of Common Pleas are

reversed and remanded to the Allegheny County Court of Common Pleas for proceedings consistent with this opinion to determine the nature and extent of the refund to which appellants may be entitled.

Each party pay own costs.

Mr. Justice O'Brien concurs in the result.

Mr. Justice Eagen filed a dissenting opinion in which Mr. Chief Justice Jones joined.

Mr. Justice Pomeroy filed a dissenting opinion.

Dissenting Opinion by Mr. Justice Eagen:

I emphatically dissent!

It is not and may not be questioned that the City of Pittsburgh has the power to tax a parking transaction for revenue purposes under the Local Tax Enabling Act, Act of December 31, 1965, P. L. 1257, 53 P.S. §6902. See also, *University Club v. Pittsburgh,* 440 Pa. 562, 271 A. 2d 221 (1970). However, the majority rule that this particular tax on parking transactions imposed by the City of Pittsburgh is confiscatory, and, hence, amounts to an unconstitutional taking of private property without due process of law. Neither the *facts in the record* or the pertinent case law support this conclusion. In fact, every case cited by the majority in support of its conclusion reaches the opposite result.

Thirty-three years ago in *Philadelphia v. Samuels,* 338 Pa. 321, 12 A. 2d 79 (1940), this Court held that

before a tax may be ruled confiscatory the challenging taxpayer must establish two facts: (1) that the tax is forcing a substantial, as distinguished from an occasional, businessman out of business; and (2) the challeged tax cannot be passed on to the consumer. To the same effect, see *Philadelphia v. Eglin's Garage, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941). Even a casual reading of the instant record discloses the complaining-plaintiffs have failed to establish either one of these facts. Moreover, the trial court whose findings of fact have the force and effect of a jury's verdict and which, incidentally, the majority opinion ignores, specifically found on ample evidence in the record: (1) the demand for parking space in the City of Pittsburgh far exceeds the supply; (2) none of the plaintiffs have increased their rates because of the tax involved; (3) the plaintiffs have not attempted to pass on the increased tax to their parking patrons; and (4) when the City's Parking Authority recently raised its rates, it experienced only a temporary reduction in the number of cars seeking use of its parking facilities. Furthermore, after reviewing the evidence the trial court concluded that the complaining-plaintiffs are continuing to make a profit from their operations, though it may not be as great a margin as desired, and if any privately-owned parking operators are forced out of business it will be only a few border-line cases. It is obvious, therefore, that the majority opinion fails to comport with our rulings in *Philadelphia v. Samuels*, supra, and *Philadelphia v. Eglin's Garage, Inc.*, supra.

Focusing now on the decisions of the Supreme Court of the United States, it can be stated as a general prin-

ciple that under normal circumstances the power to tax is unlimited[1] and the due process clause of the Fifth and

[1] Early in the history of the Supreme Court of the United State, Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 17 S. Ct. 579 (1819), stated the following with respect to the unlimited nature of the taxing power:

"[T]he power of taxing people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may chose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

"The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse." Id. at 428, 17 S. Ct. at 607.

In *Knowlton v. Moore*, 178 U.S. 41, 20 S. Ct. 747 (1900), the Supreme Court of the United States recognized the inherent difficulty in placing a limitation on the lawful exercise of the taxing power: "In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation could be levied." Id. at 60, 20 S. Ct. at

Fourteenth Amendments is not a limitation upon the taxing power of the legislative branch of the government.[2]

In *Magnano Co. v. Hamilton*, 292 U.S. 40, 54 S. Ct. 599 (1934), the Supreme Court explained under what circumstances the due process clause limits a taxing statute: "Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. . . . And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. . . . That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. . . . Collateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope

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[2] In *Brushaber v. Union Pac. R. R.*, 240 U.S. 1, 36 S. Ct. 236 (1916), the Supreme Court noted the due process clause is not a limitation on the lawful exercise of the taxing power stating: "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. *Treat v. White*, 181 U.S. 264; *Patton v. Brady*, 184 U.S. 608; *McCray v. United States*, 195 U.S. 27, 61; *Flint v. Stone Tracy Co.*, supra; *Billings v. United States*, 232 U.S. 261, 282." Id. at 24, 36 S. Ct. at .

of judicial inquiry. . . . Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses . . . unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state." Id. at 44-45, 54 S. Ct. at 601-02. Thus, the due process clause only affects the validity of a taxing statute where it can be ascertained the statute is "arbitrary", and not an exercise of the taxing power, but a "disguise" for the exertion of a different and unlawful power. The majority opinion does not indicate this taxing statute qua taxing statute is invalid, or the taxing measure "does not involve an exertion of the taxing power," which are the guidelines established by the Supreme Court of the United States. Rather, the majority opinion focuses on the tax rate and its enforcement, and I view this as error. It is one thing to say a taxing statute is arbitrary and beyond the reach of the taxing power of the legislative branch, a point I do not contest, but it is quite another to say the exercise of the lawful taxing power is a violation of due process of law because of a high tax rate.

The Supreme Court of the United States has considered the issue of high tax rates in numerous instances, and in each case the Court refused to strike down the levy because of the high rate structure. In *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 55 S. Ct. 525 (1934), the Court reviewed a gross sales tax on merchants. Speak-

ing specifically of the extent of the burden of a tax, the Court stated:

"Every tax law must pass the constitutional test applied by the courts to the method of imposition, but the measure of the impost rests in the discretion of the Legislature.

"To condemn a levy on the sole ground that it is excessive would be to usurp a power vested not in the courts but in the Legislature and to exercise the usurped power arbitrarily by substituting our concept of public policy for those of the legislative body." Id. at 562, 55 S. Ct. at 530. Thus, in *Stewart*, the Court expressly stated the "measure of the impost" is not for the courts to consider. In *Veazie Bank v. Fenno*, 8 Wall. 533 (1869), again the Court reflected on the issue of high rates, stating: "It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

"The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution." Id. at 548. See also *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 41 S. Ct. 219 (1921). Not-

withstanding these pronouncements, the Majority opinion hinges its decision on consideration of the tax rate and enforcement or more precisely, the "result" of the exertion of the lawful taxing power, an approach the Supreme Court of the United States has consistently stated to be erroneous.[3]

If one focuses exclusively on the result by reviewing the tax rate and its impact, it is conceivable that every tax could be considered confiscatory. The true essence of the plaintiffs' claim is the tax rate is so high they are

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[3] In *Magnano*, the Court stated: "The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the 10 percent tax imposed upon the notes of state banks involved in *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482. This court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments. 'The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.' Again, in the *McCray* case, supra, answering a like contention, this court said (page 50 of 195 U.S., 24 S. Ct. 769, 778) that the argument rested upon the proposition 'that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.' And it was held that if a tax be within the lawful power of the Legislature, the exertion of the power may not be restrained because of the results to arise from its exercise." 292 U.S. at 45, 54 S. Ct. at 602.

barred from making the profit margin they would desire. Given this fact, and accepting the majority's rationale, it follows that a marginal business with a small profit margin could make the same claim appellants herein assert about a 5% excise tax. In this regard, the *Magnano* Court stated: "If the tax imposed had been 5 cents instead of 15 cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act." 292 U.S. at 47, 54 S. Ct. at 602.

The most troublesome aspect of the rationale adopted by the majority opinion is that by considering the tax rate, it is taking on a non-judicial function, and in effect sitting as a legislative body. This approach strikes at the heart of the principle of separation of powers and is, therefore, contrary to constitutional doctrine. The sum and substance of the majority's opinion is: the tax rate is too high for the garage owners to make a substantial profit; hence, the tax is unjust and must be struck down. However, the wisdom of a tax rate is strictly for the legislative branch, and for this Court to strike a tax down because of a high rate is to usurp a legislative power. Moreover, by so doing this Court has to go beyond its own power and exercise the usurped power in an arbitrary fashion by substituting its concept of public policy, or wisdom, for

that of the Legislature. See *Stewart Dry Goods Co. v. Lewis*, supra.

In *McCray v. United States*, 195 U.S. 27, 24 S. Ct. 769 (1903), the Supreme Court stated:

"Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only charged with the duty of upholding the Constitution but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation.

"It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the au-

thority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department." Id. at 53-54, 24 S. Ct. at . It is not within this Court's power or function to make legislative decisions, such as the wisdom of a particular tax rate. "Once the lawfulness of the method of levying the tax is affirmed, the judicial function ceases. He deludes himself by false hope who supposes that, if this court shall at some future time conclude the burden of exaction has become inordinately oppressive, it can interdict the tax." *Stewart Dry Goods Co. v. Lewis*, supra, 294 U.S. at 563, 55 S. Ct. 530.

The majority, however, would have us believe the rulings of the Supreme Court of the United States are not applicable to the instant case because of the element of competition. In my view, the argument that the combination of a high tax rate and government competition invalidates a taxing measure is spurious for the dual reason that the tax rate is not for us to consider, and the element of competition is basically irrelevant. Our concern is with the lawfulness of the method of levying the tax, not with these two elements. The majority apparently believes these two elements bring the tax within the

Magnano rule that a tax will be considered uniawful when "its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power." But there is not one shred of evidence in the record that this is anything but a pure taxing measure for revenue purposes. There is not any evidence in the record that this measure is a "disguise." Competition is clearly beyond the scope of this case, since our inquiry is limited to the lawfulness of the "form of taxation."[4]

The majority views government competition as a new element in this area of the law, an element never presented in a factual situation to a court before. However, in the *Veazie Bank Case*, the Supreme Court of the United States was faced with a comparable situation since the federal government was therein directly competing with the state banks in issuing currency.[5] A 10% tax was imposed on

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[4] The question is raised by the majority's approach that if the government unit was in the public transportation field, would this dictate a like result. Under this example, the government would be "competing" with the parking lot owners, although the competition would be more indirect. Examples such as this show how far removed from the proper judicial function the majority will lead us. Moreover, the majority somehow suggests this tax puts the City at a competitive advantage; however, it is not this tax but the exemptions the City has from other taxes which puts the City in a better position than the private operators. Thus, it would appear under the majority approach not only this tax, and competition, but all taxes which affect the City, must be considered.

[5] It can be argued part of the foundation of this case rests on the power of the federal government to provide currency, however,

the notes of state banks and the effect was to put the national banks at a competitive advantage by driving the state banks out of existence. The Court never once discussed the element of competition and stated: "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. *So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.*" 8 Wall., supra, at 548. Thus, I do not view the element of competition as adding anything new or different to this area of the law, or as relevant to the consideration of the lawfulness of a taxing form.

Mr. Chief Justice Jones joins in this opinion.

Dissenting Opinion by Mr. Justice Pomeroy:

I concur in the dissenting opinion of Mr. Justice Eagen, but believe it desirable to augment that opinion by several additional observations.

I.

I consider it unfortunate that the Court, in its footnote 2, prematurely and unnecessarily undertakes to decide the relative authority of our decisions in *Rochester & Pittsburgh Coal Co. v. Indiana County Board of Assessment*, 438 Pa. 506, 266 A. 2d 78 (1970), and *Lynch v. Owen J. Roberts School District*, 430 Pa. 461, 244 A. 2d

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it is equally clear the case holds excessive tax rates alone will not invalidate a taxing measure.

1 (1968). These cases are concerned with equity jurisdiction in constitutionally-based challenges to taxing statutes where the challenge can be adjudicated in a statutorily prescribed appeal procedure. That question is only obliquely involved in this case in connection with the applicability of the procedure allowed by section 6 of the enabling statute[1] whereby the taxpayer can secure a judicial determination of the reasonableness of a local tax. There was no attempt by the taxpayers to avail themselves of the section 6 determination of "reasonableness"; neither was there any objection by the City at the trial level or on appeal in the Commonwealth Court to the exercise of equitable jurisdiction because the enabling act procedure had not been pursued. Thus the discussion in the Commonwealth Court opinion as to what a court might have done (i.e., find the tax rate "unreasonable") had a section 6 challenge been made was beside the point; the decision holds the tax valid on constitutional grounds. The same is true of this Court's opinion, since the decision goes off on constitutional grounds, albeit with the opposite result. All that the City is doing (part IV of its brief in this Court) is to argue that since the parties agree that the case raises issues solely of a constitutional nature, the "reasonableness" of the parking tax cannot be raised on this appeal. In any event, it argues, a section 6 attack

[1] The "Tax Anything Act", Dec. 31, 1965, P. L. 1257, as amended, 53 P.S. §6906. That section permits taxpayers aggrieved by a local tax measure to challenge its validity within a thirty (30) day period following enactment. The court shall then, if it concludes that the ordinance is unlawful or finds that the tax imposed is "excessive or unreasonable", declare the ordinance invalid, or may reduce the rate of the tax.

must be timely made, and in the trial court. In addition it cannot gain consideration in this suit by being "appended" to the constitutional issue—even a substantial one, which the City contends this one is not.

This Court has only recently granted allocatur in a case squarely presenting the jurisdictional problem involved in *Lynch* and *Rochester*, supra. *Borough of Greentree v. The Board of Property Assessment of Allegheny County*, Nos. 141 and 142, March Term, 1973 (Allocatur granted on April 11, 1973). Our ultimate decision in that case should not be prejudiced by needless dicta in this one.

II.

On the constitutional question, the Court today holds that the parking tax ordinance of the City of Pittsburgh is a taking of "private property . . . for public use without just compensation" in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, relying, *inter alia*, on dictum found in *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940). On this record I cannot agree.[2]

I can conceive that a tax could be confiscatory (and I do not understand Justice Eagen to be of a different view). For example, were the ordinance one imposing a tax of 100% on the *net income* of the appellants' enterprises, thus making it impossible beyond any doubt to operate at a profit, I am inclined to think that this would

[2] I do agree, however, that the tax is not imposed in violation of the uniformity requirement of the Constitution of Pennsylvania, Art. VIII, §1.

be a taking of private property for which compensation would be required. The tax here, of course, is on gross proceeds, not net income, and at the admittedly high rate of 20%. This tax *could*, however, be the practical equivalent of a 100% tax on net income if the operating expenses of the taxed enterprises absorb the other 80% of gross receipts. But this complete elimination of profitability would, of course, have to be supported by the experience of the industry.

It is at this point that the Court and I part company, for I believe that little attention has been paid to the facts of the case and the economic theories necessarily involved.[3] There are two factual issues: (a) current, substantial unprofitability of the taxed enterprises, and (b) lack of market power to shift the incidence of the tax to

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[3] I also disagree with the majority's reliance (see opinion of the Court, ante at n.14) on the constitutional theories of Professor Sax, see Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964), and on the "similar rationale" of the Supreme Court of Hawaii in *Hasegawa v. Maui Pineapple Co.*, Haw. , 475 P. 2d 679 (1970).

In *DayBrite Lighting, Inc. v. Missouri*, 342 U.S. 421, 96 L. Ed. 469 (1952), the Supreme Court of the United States sustained against constitutional attack a Missouri statute which makes it a misdemeanor to deduct wages of an employee when the employee absents himself to vote. The Supreme Court has now unanimously reiterated that view in *Dean v. Gadsden Times Publishing Co.*, U.S. , L. Ed. 2d , 41 U.S.L.W. 3643 (June 11, 1973) (Per Curiam: an Alabama statute providing that an employee excused for jury duty "shall be entitled to his usual compensation received from such employment less the fee or compensation he received for serving as a juror" is on "no less sturdy a [constitutional] footing" than the statute upheld in *DayBrite Lighting*).

the parking consumer. Like the chancellor below[4]—to whose findings the Court pays scant heed[5]—I am not satisfied with appellants' evidentiary showings on either point.

(a) *Current, Substantial Unprofitability.*

Ordinance No. 704 of the City of Pittsburgh, imposing a 20% tax on the gross proceeds of commercial parking transaction, was enacted on December 31, 1969 and became effective on February 1, 1970. It superseded a predecessor parking tax (Ordinance No. 674) which was enacted in 1968 and which imposed a similar tax of 15%. We are told, though not part of the record made below, that Ordinance No. 704 in turn has been superseded by Ordinance No. 30 of January 26, 1973 which became effective on April 1, 1973. There is, therefore, a period

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[4] The chancellor found that:

"19. The demand for parking spaces in the City of Pittsburgh far exceeds the supply.

20. None of the plaintiffs have [sic] increased their [sic] rates since February of 1970.

21. Plaintiffs have not attempted to pass on the increased tax on the parking lot patrons."

[5] As the majority opinion indicates, the Commonwealth Court reversed the chancellor's finding, and observed that: "The appellants are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates but also because the appellants are in competition with a public authority which, exempt from other taxes, can charge less." While I see no basis for reversing the chancellor's findings of fact, it is to be noted that the Commonwealth Court *affirmed* the chancellor's conclusions of law. Thus that court could as easily have said that "even on appellants' version of the facts, affirmance would be in order."

of a little more than three years during which appellants' businesses were subject to and in fact paid the disputed tax. The present lawsuit, however, was filed on February 20, 1970, very soon (nineteen days) after the tax became effective, and the trial of the case took place on September 15, 16, and 17, 1970. The economic evidence there introduced was as the Court's opinion indicates, "*projected* figures for 1970" based on industry experience under the challenged tax from February 1, 1970 through May 31, 1970. While there is nothing inherently inadmissible about economic projections, properly constructed and qualified,[6] I think that they become inherently inadequate when actual economic data are in fact available for the period of the projection. We do not adequately discharge our duty of invalidating taxing acts, see *Commonwealth v. Life Assurance Co. of Pennsylvania*, 419 Pa. 370, 377, 214 A. 2d 209 (1965), as "clearly, palpably and plainly" unconstitutional when we so hold on the basis of five months' experience under the statute as contrasted with the now available three years' experience. The appellants have prevailed in no court save this one and hence have throughout that period been subject to the 20% tax. I cannot see that a remand for develop-

[6] The plaintiff-appellants' witness who assembled the economic data supplied to him by appellants was by education an electrical engineer. He had at one time taken one 6 months course in statistics but none in accounting. The data introduced did not purport to be a complete presentation of the operations of appellants' business entities. In addition, there was no showing of what fraction of the operating expenses represented salary attributed to the owners of the various enterprises involved here, or what portion of such payments to owners could fairly be said to represent return on investment.

ment of the record in light of *actual industry experience* would prejudice the interests of any party to these proceedings, public or private. Certainly the people of the City of Pittsburgh are entitled to as much before losing the millions of dollars in tax revenues here involved.

(b) *Lack of Market Power to Shift the Incidence of the Tax.*

Appellants' showing of a lack of ability to pass the tax on to the consumer is most unpersuasive. It consisted of two kinds of evidence: first, assertions on behalf of the appellant-enterprises that they were charging all the traffic would bear at the time of enactment of the 20% tax, i.e., prices which maximized their gross proceeds,[7] and second, testimony of the manager of Meyers Bros. Parking-Central Corporation, the operator of the parking garage in Chatham Center, that when that corporation raised its prices in 1968 in response to the enact-

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[7] A representative sample of such testimony follows: "Q: . . . Is it feasible for you to raise your rates now to meet this tax? A: I cannot raise the rates now. If I could raise the rates to meet this tax that's been in effect since February, I would have. I do not feel that I would accomplish anything but drive my customers away if I raise my rates at this time.

. . .

A: . . . I have a feeling for this business . . . There is only so much you can charge.

. . .

Q: So . . . [W]hat is your opinion as to whether this parking tax can be passed on? A: The parking tax can never be passed on. That is silly. You are charging the rate that you think is the best one for you right at that time. If you raise that rate, you either drive customers away or you change the character of the business." Record at 19, 20.

ment of the 1968 ordinances of 15%, the business of that garage had actually diminished.

As to the first, I do not think it follows from the fact that all private entrepreneurs strive to maximize profits that all prices set by them are at profit-maximizing levels. The bare assertion by an appellant that "[if] I could raise the rates to meet this tax . . ., I would have . . ." falls far short of the quality of proof required to show the tax clearly, palpably and plainly unconstitutional.

The second line of proof is similarly inadequate. At issue here is the market power of the *taxed industry* to shift the incidence of the tax to the consumer. What occurred in 1968 when *one member* of that industry raised its rates is hardly probative of what would occur if the *industry*, in response to enactment of a tax ordinance at a higher rate, were to raise rates.[8]

Not only do I conclude that appellants failed in their proof of inability to shift the tax burden such as to invalidate the tax, but I find ample evidence of the existence of such market power. First, there is the fact, revealed by the testimony of appellants' witnesses, that appellants have posted general rate increases at intervals in the 1960s and have always experienced an increase in gross receipts. Second is the fact—a matter of common knowledge in Pittsburgh of which I think the Court can take

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[8] I would consider the experience of Meyers Bros. as only of marginal relevance to the situation in the City at large. The Chatham Center Garage rates both in 1970 and in 1973 have been less than those in comparable downtown garages, which no doubt indicates a less strategic competitive position.

judicial notice—that the current parking rates generally posted in downtown Pittsburgh reflect a significant rate increase over those rates of the summer of 1970 which appellants sought to characterize as profit-maximized.[9] It would appear, then, that the demand for parking spaces which appellants thought in 1970 would decline in the face of a price increase, thus resulting in a decrease of gross receipts, in fact now supports the increased rates of 1973. Whether or not gross receipts have fallen I, of course, do not know; I suggest that the increased prices have now been in effect long enough for appellants to have determined whether their operations are losing business or benefitting because of them. And finally, there is the fact that there exists at this time no source of supply which could satisfy any portion of the demand now satisfied by appellants' garages and lots. This brings me to the position of the Pittsburgh Parking Authority.

III.

Whether or not appellants possess the market power to shift the incidence of this tax depends to a large degree on the presence of competitors, i.e., other sources of supply capable of satisfying demand formerly satisfied by appellants. Were it the case that the Parking Authority and appellants were *individually* capable of satisfying *all* demand in the market, *any* price differential between the rates of the Authority and those of appellants would logically cause all demand to seek the source of cheapest supply. Under such a market condition, appellants would necessarily charge rates the same as or lower than those

[9] See the Appendix to this opinion.

of the Parking Authority and would be unable to pass a parking tax on to the consumer if doing so caused them to charge rates above those of the Authority. If the tax thus imposed also removed all profitability from the private business of commercial parking, then I think the evidentiary requirements of *Philadelphia v. Samuels*, supra, would be met.

It is clear, however, that such is not the situation here. The record shows that there are some 24,000 parking spaces in downtown Pittsburgh; of these, 17,470 are controlled by appellants here and 6,530 are controlled by the Pittsburgh Parking Authority; there exists also a demand, as yet unsatisfied, for approximately 4,000 additional spaces, a demand which is projected to increase by 1979 to 10,500 spaces. The price differential between the lower rates of the Parking Authority and the higher rates of appellants which so concerns the majority is proof positive, so it seems to me, that appellants supply a demand that cannot be satisfied by the Authority. This is to say, an enterpreneur (the appellants) who controls 71% of the supply in a market of unsatisfied demand need not concern himself with a low-cost competitor (the Parking Authority) who controls 29% of the supply, has no excess capacity, and cannot service demand which the 71% competitor might drive away through price increases. The competitors with which appellants must concern themselves are the *alternatives to driving* (i.e., public transportation, car pools, etc.). But there is much public debate today whether the American driver can be forced out of his privately owned and privately driven automobile, whatever the cost of operation may be.

The presence of the Parking Authority in this picture, and its preferred status in terms of property taxes, is therefore in my view an irrelevant factor.

For the reasons given, I would remand for further proceedings to determine appellants' *actual* experience under the 20% gross receipts ordinance and would reserve judgment meanwhile on the question of whether an unconstitutional taking by excessive, confiscatory taxation has occurred.[10] I therefore dissent.

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[10] I would consider it unfortunate if today's opinion might be thought to have restrictive implications for the future discouragement by a metropolitan government of the operation of private vehicles in the congested, downtown areas. Governmental activity in the field of environmental and motor vehicle control is increasing apace. This trend may ultimately remove the profitability from some commercial activities, such as providing parking space, which today depend on the automobile. I should hope that government is not constitutionally obligated to purchase those activities. Under current Fifth Amendment law, I am satisfied that is not the case. *Goldblatt v. Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 130 (1962).

APPENDIX TO THE DISSENTING OPINION OF MR. JUSTICE POMEROY

Arranged below is a tabular comparison of the rates charged by lots and garages operated by the plaintiff-appellant Alco Parking Corporation. The 1970 rates are taken from the record filed in this Court; the 1973 figures are those which were publicly displayed on the afternoon of May 17, 1973.

Sixth & Penn Garage (Corner of Sixth Street & Penn Avenue)

Day Rates	1970	1973
1 hr.	$0.75	$0.85
2 hrs.	1.00	1.10
3 hrs.	1.25	1.35
4 hrs.	1.50	1.60
5 hrs.	1.75	1.85
6 hrs.	2.00	2.10
7-8 hrs.	2.25	2.35
8-9 hrs.	2.50	
8-24 hrs.	2.50	2.60

Greyhound Garage (Penn Avenue at 12th Street)

Day Rates	1970	1973
1 hr.	$0.60	$0.75
2 hrs.	0.70	1.00
3 hrs.	0.90	1.25
4 hrs.	1.00	1.50
5 hrs.	1.30	1.75
5-8 hrs.	1.50	2.00
8-10 hrs.	1.75	2.25
11 hrs.	1.90	2.50
12 hrs.	2.15	2.75
12-24 hrs.	2.40	2.75

IBM Garage* (Blvd. of the Allies and Stanwix Street)

Day Rates	1970	1973
1 hr.	$0.75	$1.00
2 hrs.	1.00	1.25
3 hrs.	1.25	1.50
4 hrs.	1.50	1.80
5 hrs.	1.75	2.10
6 hrs.	2.00	2.40
7 hrs.	2.25	2.70
7-12 hrs.	2.50	3.00
12-16 hrs.	2.75	3.25
16-24 hrs.	3.00	3.50

*operated in 1973 by Wm. Penn Parking, another plaintiff-appellant.

Gateway Towers Garage (Ft. Duquesne Blvd. & Commonwealth Place)

Day Rates	1970	1973
1 hr.	$0.50	$1.00
2 hrs.	0.75	1.25
3 hrs.	1.00	1.50
4 hrs.		1.75
+ ea. add. hr.	0.25	0.25
max. for 24	3.00	3.25
weekly	15.00	18.00

White Tower Lot (Liberty Avenue between 10th and 11th Streets)

Day Rates	1970	1973
1 hr.	$0.60	$0.75
2 hrs.	0.85	1.00
3 hrs.	1.15	1.25
4 hrs.	1.40	1.50
5 hrs.	1.65	1.75
6 hrs.	1.90	2.00
7 hrs.	2.15	2.25
Max.	2.15	2.50

U.S.O. Lot (Penn Central R.R. Station)

Day Rates	1970	1973
1 hr.	$0.70	$0.75
2 hrs.	0.85	1.00
3 hrs.	1.15	1.25
4 hrs.	1.40	1.50
5 hrs.	1.65	1.75
6 hrs.	1.90	2.00
7-12 hrs.	2.50	6-12 hrs 2.25
		12-24 hrs 2.50

Maiden Lane Lot (10th Street to 11th Street, North of Penn Avenue)

Day Rate	1970	1973
All-day parking	$1.50	$1.75

THE SUPREME COURT OF PENNSYLVANIA
Western District

ORDER

August 7, 1973.

Petition Denied.

Per Curiam

Mr. Justice Eagen dissents.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 643 C.D. 1971

Alco Parking Corporation; Arena Parking, Inc.; Campus Parking, Inc.; Fourth Avenue Parking, Inc.; Grant Parking Inc.; Harry W. Sheppard, Jr., t/a Stanwix Auto Park; John Cominos, t/a Liberty Parking; John Stabile and Rocco A. Del Sardo, t/a Wm. Penn Parking Lot; K-Seven Parking Company; Meyers Bros. Parking-Central Corp.; Parking Service Corporation, Inc.; Wm. Penn Parking Garage, Inc.,

Appellants

v.

City of Pittsburgh,

Appellee

Before

Honorable James S. Bowman, President Judge.
Honorable James C. Crumlish, Jr., Judge.
Honorable Harry A. Kramer, Judge.
Honorable Roy Wilkinson, Jr., Judge.
Honorable Glenn E. Mencer, Judge.
Honorable Theodore O. Rogers, Judge.
Honorable Genevieve Blatt, Judge.

Argued Monday, September 11, 1972.

OPINION

[6 Pa. Commonwealth Ct. 453]

Opinion by Judge Rogers, filed October 10, 1972:

This court affirmed the order of the lower court in this matter[1] but thereafter allowed reargument. The case has been reargued and additional briefs have been filed and carefully considered.

A principal factual issue below was as to the effect of the tax on appellants' parking lot operations. The expression of the opinion writer's belief that the 20 percent gross receipts tax was unreasonable is now equated by the appellants to a finding by this court that the tax was confiscatory. No such characterization of the taxing measure was made or intended to be made. Indeed the Court found that the ordinance was an exertion of the taxing power and did not constitute the exertion of a different and forbidden power, as, for example, the confiscation of property. Further, neither the Constitution of the United States nor of this Commonwealth imposes a standard of reasonablenesses in the *rate* of taxation. The cases cited in our opinion recognize this principle and the unspoken but real danger to our system of government should the courts assume power to review revenue measures by such a standard. It is true that a public parking Authority operates in competition with appellants' lots. However, the tax before us is imposed on transactions of the Authority as well as those of the appellants and we do not perceive a purpose here to favor the Authority by

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[1] See Pa. Commonwealth Ct. , , 291 A. 2d 556, 563 (1972).

destroying the appellants' businesses. Of course, the Legislature may afford court review of reasonableness and, as we noted, did so in Act 511 by procedures not invoked by the appellants.

The City advises us at reargument that our statement that there are 24,300 parking spaces in the City of Pittsburgh is erroneous and that that figure represents the number of parking spaces only in the "downtown" area. The lower court found that the number in question represented all spaces in the City. The appellants made the same assertion in their brief and this was uncontested by the City. A close examination of the record demonstrates that the court below, the appellants and we were incorrect and that the figure mentioned indeed represents the number of parking spaces in the "downtown" area only. While a higher number of spaces in the City, by reducing the percentage of appellants' lots to the total tends to bolster the City's assertion that the levy was in fact not unreasonable, it obviously had no effect on our *decision* upholding the ordinance.

We adhere to our decision affirming the order of the court below.

Theodore O. Rogers,
J.

Dissenting Opinion by Judge Kramer, October 10, 1972:

After reargument and reviewing the majority opinions, I must again register my dissent by reasserting the points made in my prior dissenting opinion, filed herein, which is made a part hereof by reference thereto. *See*

Pa. Commonwealth Ct. , 291 A. 2d 556, 563 (1972).

Based upon the record before us, I would still hold the unreasonable high twenty per cent (20%) parking tax to be confiscatory. I would still remand the case to the court below for further hearings on reasonableness.

The majority, in its second opinion, quite correctly points out the discrepancy in the number of parking spaces in the City of Pittsburgh; and, as was noted at the reargument, the number of Authority parking spaces in the neighborhood areas outside of the downtown business district, together with the number of parking spaces contained in parking lots directly owned and controlled by the City, and operated with City employees, should also be noted as discrepancies or missing statistics in the record.

I would reverse and remand.

Harry A. Kramer,
J.

Judges Crumlish, Jr. and Mencer join in this Dissenting Opinion.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 643 C.D. 1971

Alco Parking Corporation; Arena Parking, Inc.; Campus Parking, Inc.; Fourth Avenue Parking, Inc.; Grant Parking Inc.; Harry W. Sheppard, Jr., t/a Stanwix Auto Park; John Cominos, t/a Liberty Parking; John Stabile and Rocco A. Del Sardo, t/a Wm. Penn Parking Lot; K-Seven Parking Company; Meyers Bros. Parking-Central Corp.; Parking Service Corporation, Inc.; Wm. Penn Parking Garage, Inc.,

Appellants

v.

City of Pittsburgh,

Appellee

Before

Honorable James S. Bowman, President Judge.
Honorable James C. Crumlish, Jr., Judge.
Honorable Harry A. Kramer, Judge.
Honorable Roy Wilkinson, Jr., Judge.
Honorable Glenn E. Mencer, Judge.
Honorable Theodore O. Rogers, Judge.
Honorable Geneviene Blatt, Judge.
Argued February 22, 1972—Pittsburgh.

OPINION

[6 Pa. Commonwealth Ct. 435]

Opinion by Judge Rogers, filed June 8, 1972:

The City of Pittsburgh in December 1969, pursuant to The Local Tax Enabling Act of December 31, 1965, P. L. 1257, 53 P.S. §6901, *et seq.*, enacted an ordinance imposing upon all parking transactions of operators of nonresidential parking places a tax at the rate of twenty per centum of the gross receipts from such transactions received during the year commencing February 1, 1970 and thereafter. The city has imposed a tax identical except as to rate since the year 1962, the ordinance imposing such prior to the year 1965 having been imposed under the Act of June 25, 1947, P. L. 1145, 53 P.S. §6851, repealed and replaced by the Act of December 31, 1965, P. L. 1257. Under said ordinances the tax has been increased from ten per centum in 1962 to fifteen per centum in 1968 and by the ordinance here under attack to twenty per centum.

The appellants, parking lot operators, here sought in equity to restrain the city from enforcing the twenty per centum ordinance effective February 1, 1970. The court below, after trial on the merits, made an adjudication *nisi* dismissing the complaint and, after exceptions filed and dismissed, a decree that its adjudication *nisi* should be entered as a final decree. This appeal followed.

The subject of municipal taxes upon the gross receipts of parking lot transactions has been the subject of considerable litigation. All save one of the appellants' contentions here have been conclusively decided against

them, and we will not burden this opinion by a lengthy repetition of the reasoning of such definitive holdings.

The appellants suggest that under the equal protection clause of the Fourteenth Amendment of the United States Constitution and uniformity clause of Article VIII section one[1] of the Constitution of Pennsylvania, their business may not be singled out for this tax. Their fire comes from two barrels: first, that there is no rational basis for distinguishing the commercial parking business from other busnesses and second, that there is no such basis for distinction between nonresidential and residential parking. Unfortunately for the appellants the targets at which they aim have been long since removed from the range. In *Philadelphia v. Samuels,* 338 Pa. 321, 12 A. 2d 79 (1940), the Supreme Court upheld for the purpose of a tax identical to that in the instant case by implication a classification of parking lots as distinguished from other businesses and explicitly the classification of open parking lots as distinguished from closed parking lots, writing:

> "Another contention is that the ordinance is bad as discriminating against open parking lots in favor of closed garages engaged in parking. It has not been shown that the municipal legislature did not have reasonable ground for separating open parking lots from closed garages and placing them in separate classes for the purpose of taxing the parking transaction in the open lot. The growth of such parking in recent years is [a] matter of common knowledge

[1] The appellants, *Alco Parking Corp., et al.,* refer, we assume by inadvertence, to Art. IX, section 1. the place where the so-called uniformity clause was, prior to 1968, located.

of which the courts take notice. Generally, the operation of such lots involves more extensive use of sidewalk and street than is involved in the operation of the closed garage; land occupied by a closed garage is assessed at the value of land and buildings, whereas the open parking lot is assessed without buildings or buildings of negligible value. Other elements of the same general character suggest themselves. In such circumstances the court cannot say that the municipal authorities had not sufficient reason for the classification." 338 Pa. at 326, 327, 12 A. 2d at 82.

In *McGillick v. City of Pittsburgh*, 415 Pa. 581, 203 A. 2d 480 (1964), the Supreme Court affirmed *per curiam* an order of the Allegheny County Court specifically upholding the city's classification, continued in the present ordinance, of commercial parking places as taxable and residential as not subject to levy. Finally, on this point, lacking better expression of our own devising, we quote from *Commonwealth v. Lafferty*, 426 Pa. 541, 550, 233 A. 2d 256, 261 (1967), where the classification upheld was that of taxable non-public utilities as distinguished from excluded public utilities. Mr. Justice Eagen there wrote:

"Further, it is in the context of the whole Sales and Use Tax statute that we must view the exclusion. Since this statute is one designed to raise revenue, the state need not justify any distinction drawn between the taxed and the non-taxed 'so long as some other reasonable basis for treating the various classes differently exists. Where such distinction exists, the

wisdom of the legislative policy of taxing one class and not another is not a matter for the courts.' *Commonwealth v. Life Assurance Co. of Pa.* 419 Pa. 370, 377 n. 11, 214 A. 2d 209, 215 n. 11 (1965). As stated in *Commonwealth v. Life Assurance Co. of Pa.*, Id. at 376-377, 214 A. 2d at 214: 'By necessity a wide discretion must be conceded to the Legislature in the classification of various businesses or occupations for purposes of taxation. . . .'"

As further stated in *Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370, 376, 379, 214 A. 2d 209, 214, 215 (1965):

"The only constitutional limitation placed upon the power of the Legislature to distinguish between various entities for purposes of taxation is that their basis for doing so be reasonable. . . .

* * * * * * *

"And where such distinction rests upon differences recognized and acted upon by the business world, it is not within the province of the courts to intrude. . . So long as the classification is neither capricious nor arbitrary, there is no denial of the equal protection of the law. . . ."

The distinction here between parking lots and other businesses and between commercial and residential parking lots, as has been held in *Philadelphia v. Samuels*, supra and *McGillick v. City of Pittsburgh, supra*, satisfy constitutional requirements.

Within the general ambit of equal protection and uniformity, the appellants make two other arguments, one

based on what this tax might be named and the other on the asserted inaccuracy of a statement in the preamble of the ordinance concerning the characteristics of the appellants' enterprises. As to the first, appellant Meyers Brothers contends that because the city at sometime in the course of the litigation called the tax a license tax, it is such and under settled principles may not exceed the cost of regulation. As clearly declared in *Philadelphia v. Samuels, supra,* the measure in question is an excise tax imposed upon the transaction of parking a motor vehicle. It is a revenue measure by terms of the ordinance and by the Act of Assembly by which it was authorized. In *Philadelphia Tax Review Board v. Smith, Kline and French Laboratories,* 437 Pa. 197, 262 A. 2d 135 (1970), the Supreme Court held that a tax imposed by the City specifically denominated a "License Tax" was nevertheless a revenue measure and not preempted by a state license and regulatory measure.[2]

The appellants' argument that the preamble of the ordinance here somehow supports their view that the classification of their enterprises for the tax is unreason-

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[2] The appellants also contend that they are subjected to double taxation because the city levies a six-mill tax on gross receipts upon all businesses in the city, also pursuant to The Local Tax Enabling Act. There is no constitutional prohibition of double taxation, (*Puntureri v. Pittsburgh School District,* 359 Pa. 596, 60 A. 2d 42 (1948)), provided uniformity is satisfied. *Plumly v. Philadelphia School District,* 182 Pa. Superior Ct. 122, 126 A. 2d 768 (1956). Not only is the general business tax imposed on the *privilege* of engaging in business in the city and the tax here is on the *parking transaction,* a different subject; but uniformity is, as we have herein held, supplied by the imposition of the same taxes upon all commercial parking establishments.

able is difficult to follow because it stems from a misreading of the ordinance. The preamble in question states: "Nonresidential parking places, by reason of the frequency of their use at various hours of the day, their location, their relationship to traffic congestion and other characteristics, present problems requiring municipal services and affect public interest, differently from parking places accessory to the use and occupancy of residences. . . ." The appellants say that this seeks to justify the classification of parking lots on the basis that such lots cause congestion and therefore require municipal services, and that because such lots in fact alleviate congestion and reduce municipal concern for traffic congestion, the asserted basis for classification disappears. But the quoted portion of the ordinance, as we read it, does not seek to justify the distinction between parking lots and other business but between nonresidential and residential lots. Nor does it suggest that parking lots cause congestion; rather, it says that their activities are related to congestion and require municipal services.

We have attempted here to treat all of appellants' arguments based upon alleged want of equal protection and lack of uniformity. We have carefully considered their thorough briefs and have concluded that the ordinance satisfies these constitutional requirements.

The appellants further vigorously contend that rate of tax here imposed is so high as to result in the taking of their property without due process of law. A tax, they say, which is confiscatory is unconstitutional. Despite the city's argument and the finding of the court below to the contrary, this tax is indeed imposed at an unreason-

able rate. The *undisputed evidence* on this record is as follows:

1. There are about 24,300 parking spaces in the City of Pittsburgh. Of this number 6100 are served by a public parking authority, subjected to this tax, but exempt from other taxes including those on real estate. Of the balance of about 18,000 spaces, the plaintiffs here owned or operated about 17,000.

2. Based upon six months' operations and a sound statistical projection for the balance of the year 1970 with expenses computed at 1969 rates, that portion of the industry represented by appellants, would, during the year 1970, earn gross revenues of over $8,000,000, pay $1,600,000 on account of this tax and sustain a loss of $270,000. Of the fourteen appellant enterprises nine would sustain losses and of the others the one showing the largest profit would earn an amount equal to only 2.9% of its gross revenues.[3]

3. The appellants are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates but also because the appellants are in competition with a public authority which, exempt from other taxes, can charge less.

4. The rate of tax was increased from fifteen per centum effective in 1969 to twenty per centum, although in 1969 the appellants lost $26,000 on gross revenues

[3] Omitted from these figures are four operations. The record is clear that one of those omitted would have shown a sizable loss due to unusual factors. The other three were management operations for which the appellants received a fixed fee and the owners took losses.

of about $7,700,000 on which they paid a tax under this ordinance of more than $1,400,000.

The problem, however, is that there is no constitutional prohibition of taxation at unreasonable or even confiscatory rates. The appellants' argument upon this point rests primarily upon the following statement by Mr. Justice Linn in *Philadelphia v. Samuels,* 338 Pa. at 327, 12 A. 2d at 82:

> "Little need be said on the point that the ordinance is confiscatory. The state expressly authorized the city to levy taxes for general revenue purposes and the ordinance so provides. There is nothing in the record to show that the rate imposed by the ordinance is so high as to result in taking property without due process. The probability is that, in effect, the tax will be passed on to patrons, but if it is not, and if an occasional operator cannot afford to continue in business and pay the tax, it may be unfortunate but will not render the ordinance invalid."

At most this statement supplies no more than an implication that an ordinance which makes it impossible for more than an occasional operator to remain in business might be invalid. On the other hand, language used by the Supreme Court in *Philadelphia v. Eglin's Garages, Inc.,* 342 Pa. 142, 144, 19 A. 2d 845 (1941), one year later indicates second thoughts concerning the quoted portions of the *Samuels* case:

> "Proof of the averments of loss . . . would not establish confiscation even if relevant. . . . In my view, therefore, the averments of loss referred to are

not sufficient to sustain the charge of confiscation *assumed to be relevant.*" (Emphasis supplied.)

It is apparent to us that our Supreme Court had in the interval considered the question in the light of very clear principle that a tax for revenue purposes is subject to no constitutional limitation upon its amount. Hence, writers and the courts have declared:

> "The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. . . ."
>
> Cooley, *Constitutional Limitations,* Eighth Ed. (1927), Vol. II, C. XIV, page 986.

> "[T]he power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.
>
> "The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the con-

stituents over their representative, to guard them against its abuse."

Chief Justice John Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, 428, 17 S. Ct. 579 607 (1819).

"Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. *Brushaber v. Union Pac. R.R.,* 240 U.S. 1, 24, 36 S. Ct. 236, 60 L. Ed. 493. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. *French v. Barber Asphalt Paving Co.,* 181 U.S. 324, 329, 21 S. Ct. 625, 45 L. Ed. 879; *Heiner v. Donnan,* 285 U.S. 312, 326, 52 S. Ct. 358, 76 L. Ed. 772. That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. Compare *McCulloch v. Maryland,* 4 Wheat. 316, 423, 4 L. Ed. 579; *Child Labor Tax Case,* 259 U.S. 20, 37 et seq., 42 S. Ct. 449, 66 L. Ed. 817, 21 A.L.R. 1432; *McCray v. United States,* 195 U.S. 27, 60, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; *Brushaber v. Union Pac. R.R.,* supra, 240 U.S. 24, 25, 36 S. Ct. 236, 60 L. Ed. 493, L.R.A. 1917D, 414, Ann. Cas. 1917B, 713; *Henderson Bridge Co. v. Henderson,* 173 U.S. 592, 614, 615, 19 S. Ct. 553, 43 L. Ed. 823; *Nichols v. Coolidge,* 274 U.S. 531, 542, 47

S. Ct. 710, 71 L. Ed. 1184, 52 A.L.R. 1081. Collateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. *McCray v. United States,* supra, 195 U.S. 56-59, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses (*Citizens' Sav. & Loan Association v. Topeka,* 20 Wall. 655, 663, 664, 22 L. Ed. 455; *McCray v. United States,* supra, 195 U.S. 56-58, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561, and authorities cited; *Alaska Fish Co. v. Smith,* 255 U.S. 44, 48, 49, 41 S. Ct. 219, 65 L. Ed. 489; *Child Labor Tax Case,* supra, 259 U.S. 38, 40-43, 42 S. Ct. 449, 66 L. Ed. 817, 21 A.L.R. 1432), unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state. The present case does not furnish such a demonstration."

Justice Sutherland in *A. Magnano Co. v. Hamilton,* 292 U.S. 40, 44, 45, 54 S. Ct. 599, 601 602 (1934).

Instructive early Pennsylvania cases to the same effect are *Kirby v. Shaw,* 19 Pa. 258 (1852); *Sharpless v. Mayor of Philadelphia,* 21 Pa. 147 (1853); *Washington Avenue,* 69 Pa. 352 (1871).

We have examined the cases cited by the appellants as authority for the power of a court to strike down taxing ordinances found to be excessive[4] and find them inappropriate to this case. In each the exorbitant exaction was in the form of a true municipal charge for conducting an otherwise lawful business and in each there were overtones of either subservience to a private purpose or lack of uniformity or attempt to regulate. No such conditions exist with regard to this general revenue measure. In any event, there are no similar Pennsylvania cases.

Having concluded that there is no constitutional infirmity suffered by the ordinance before us based upon the rate of taxation, it remains for us to consider whether The Local Tax Enabling Act contains a limitation upon the city's power to impose a tax in the unreasonable amount here levied. Section 5 of the Act, 53 P.S. §6905 provides that: "Any tax imposed under this act shall not be subject to any limitations under existing laws as to rate or amount or as to the necessity of securing court approval or as to budgetary requirements." However, Section 6, 53 P.S. §6906, authorizes taxpayers to appeal from the taxing ordinance or resolution within thirty days of its enactment and imposes upon the court the duty ". . . *to declare the ordinance* and the tax imposed thereby *to be valid unless it* concludes that the ordinance is unlawful or *finds that the tax imposed is* excessive or *unreasonable; but the court shall not interfere with the reasonable*

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[4] *Hoffman v. Borough of Neptune City*, 137 N.J.L. 485, 60 A. 2d 798 (1948); *Fetter v. City of Richmond*, 346 Mo. 431, 142 S.W. 2d 6 (19); *Martin v. Nocero Ice Cream Co.*, 269 Ky. 151, 106 S.W. 2d 64 (1937); *Peel v. Dummit*, 308 Ky. 399, 214 S.W. 2d 605 (1948).

discretion of the legislative body in selecting the subjects or *fixing the rates of tax. The court may declare invalid all or any portion* of the ordinance or of the *tax imposed* or *may reduce the rates of tax.*" (Emphasis supplied). We take these two sections together to mean that the legislative body is not, except as the Act itself provides limitations on the amounts of certain levies, limited as to the rate it may impose in the first instance; but that, if an appeal is filed pursuant to Section 6, the court may examine into the reasonableness of the tax and order a reduction if it finds that the legislative body has abused a reasonable discretion in fixing the rate. We must also conclude that while the Legislature intended that there should be an opportunity to obtain a judicial determination of the reasonableness of the rate, it intended to foreclose such examination unless made in the timely fashion it prescribed. Thus, the Legislature wisely placed a check on the possible excesses of municipalities at the same time ensuring them of the revenue sought in the absence of an attack promptly made. No taxpayer appeal under Section 6 was here taken;[5] why, we are not told.

For the foregoing reasons we affirm the order of the court below.

Theodore O. Rogers,
J.

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[5] The appellants could certainly have mustered the twenty-five aggrieved taxpayers necessary for such an appeal. Further, in this connection, we believe that the reenactment of an ordinance required by Section 4 of The Local Tax Enabling Act to be advertised because of a change of rate is a "tax levied for the first time" from which a Section 6 appeal might be taken. *Compare Glassmoyer v. Owen J. Roberts School District*, 18 Ches. Co. Rep. 85 (1970).

Opinion by Judge Kramer, Concurring in Part and Dissenting in Part, June 8, 1972:

I concur with my brothers of the majority in their holding that the private parking operators (appellants) have not proven any improper classification or illegal subject matter for taxation in violation of the Pennsylvania or United States Constitutions.

I must register my dissent to the result of the majority opinion because I believe that the record supports an allegation of the Complaint, to wit, that this parking tax increase violates the Equal Protection Clause of the United States Constitution, as found in the Fourteenth Amendment, which, *inter alia,* reads:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

It is first necessary to point out that, under the decisional law, it was not necessary for these appellants to proceed under the statute to test the constitutionality of a tax measure as suggested by the majority. In the case of *Lynch v. Owen J. Roberts School District,* 430 Pa. 461, 465, 244 A. 2d 1, 3 (1968), the Pennsylvania Supreme Court stated:

> "While we agree with the general proposition that equity will not entertain an action where plaintiff has an adequate, statutory remedy at law, we also acknowledge the presence of an exception to that doctrine, existing where a taxing statute is made the subject of a *constitutional* challenge." (Emphasis included.)

Later the Court stated:

> "Finally, we note that the equity court, having once obtained jurisdiction because of the presence of a constitutional challenge to a taxing statute, may also dispose, as did the lower court here, of non-constitutional challenges as well." 430 Pa. at 466, 244 A. 2d at 3.

See also, *Campbell, et al. v. Coatesville Area School District*, 440 Pa. 496, 270 A. 2d 385 (1970). Following the holding in the *Lynch* case, *supra*, I would also pass upon the reasonableness of the tax increase. On its face, the Taxing Ordinance in question levies a 20 per cent tax upon all parking transactions of operators of non-residential parking places, including governmental parking authorities. However we should not analyze the Ordinance and the Record while wearing blinders to all of the facts.

This record conclusively proves that of the twelve private parking operator appellants, nine will sustain losses, and none of the others will earn more than about three per cent per year.

One of the appellants' exhibits (Plaintiffs' Exhibit No. 1) sets forth in great detail their financial operating facts of life. It is based upon what were, at the time of trial, the latest actual operating statistics for the first six months of 1970 and projecting the same revenues and expenses for the balance of the year. A statistical summary of those figures, giving effect to the increased parking tax (at the 20 per cent rate), proves better than a verbal description, what has happened to the parking business in the City of Pittsburgh.

Operator	Number of Locations	Total Gross Parking Revenue 1970	Total Income (Loss)	Income as of % of Revenue
Alco Parking Corp.	10	$1, 446, 446	(5,981)	-
William Penn Parking Lots	9	661, 571	(3,703)	-
Parking Service Corp.	3	1, 965, 264	(118,887)	-
Arena Parking Inc.	2	404, 048	729	0.2%
Fourth Avenue Parking Inc.	2	550,964	16,126	2.9%
William Penn Parking Garage Inc.	1	130, 613	(5,384)	-
Campus Parking Inc.	1	146, 136	(19,048)	-
Grant Parking Inc.	1	320, 178	(62,429)	-
Oliver Plaza Garage	1	282, 923	650	0.2%
Liberty Avenue Lots	1	175, 403	536	0.3%
Stanwix Auto-park	3	638, 895	(13,604)	-
Liberty Parking	7	146, 380	(41,906)	-
Meyers Parking System	1	1, 015, 188	17,377	1.7%
K-Seven Parking Co., includes St. Francis Hospital Lot	4	285, 549	(34,175)	-
Total	46	$8, 169, 558	(269,699)	-

It is possible that other operating expenses of the private parking operators also may have increased during the test period in question; but the record in this case does not support any argument that the total of all such possible other increases would have had the impact of the increased tax here in question.

The record shows that the appellants represent about 71 per cent of the total commercial parking spaces in the City, and that the public parking authorities represent about 25 per cent of such parking spaces. The public parking authority charges lower rates and suffered no losses;[1] further it pays no real estate taxes on realty used for parking, no business receipts taxes and no gross receipts taxes. Appellants enjoy no tax exemption.

The court below found that none of these appellants proved that they could not raise their parking rates so as to recover the increased tax levied by the City. The record indicates to me, however, that at least one of the appellants twice raised its parking rates with disastrous results, thus supporting appellants' argument that they would lose more money by raising parking rates. The majority correctly recognized that the 20 per cent tax rate is an unreasonable one based upon the facts submitted by the appellant parking operators. Under the holding of *Lynch, supra,* this Court could have voided this tax increase or remanded the case.

When most of the private taxpayer classification is caused to suffer financial losses (based upon an annual

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[1] We can take judicial notice of the published financial reports of the Public Parking Authority of Pittsburgh, which show that it consistently has earned handsome annual profits, including the test year, 1970.

income statement) in the operation of their businesses resulting from an unreasonable tax increase, while at the same time the competitive governmental parking authority is permitted to use lower parking rates and realize profits because of its preferential treatment, via tax exemptions (on a total tax basis), I would hold that such private taxpayers have suffered a violation of their constitutional rights.

Under our free enterprise capitalistic system, the government was never intended to enter into competitive private businesses, except as may be justified under its police powers. When this Commonwealth instituted the authority approach to public services, it was never intended as an intentional and direct method of governmental competition with its citizens. Rather, it was intended as a means to circumvent the constitutional limitations on governmental indebtedness, where certain public services were in need of capital investment not otherwise available or provided by private citizens or businesses. Except for matters purely within a governmental function, government should not provide capital and labor to compete with its citizens. To some, who believe in some form of government other than that which we enjoy, the government should take over all businesses affecting the public interest. To them, in Pennsylvania, it would be appropriate for government to take over the steel mills and use government employees to run them, much like that which was done with the retail sale of liquor. Such a philosophical approach does violence to my understanding of our present system of government. Therefore I believe great caution should be taken to make certain that a competing government does not force the private busi-

nesses of our citizens out of existence by an arbitrary use of otherwise unrestricted taxing powers.

Private parking operations were a recognized private business long before governmental *parking* authorities came into existence.[2] Though the Legislature declared that these authorities were necessary for the public safety and welfare; and even if it could be proven that private enterprise had not the wherewithal to supply sufficient parking facilities for the public, the fact remains that once government entered this private business field it was given an unfair advantage over the private sector through tax exemptions. (*See* 53 P.S. 355.)

The record in this case indicates that the governmental parking authority competitor does not pay real estate taxes or gross receipts taxes to the City, while the appellants do pay such taxes. Authorities were not instituted for the purpose of making profits and therefore should show none. Parking authorities' parking rates are lower because of the legislative directions and advantages they receive. Apparently the private sector of the parking business survived, even with these differentials, for many years. But now, as the record shows, the City has raised the parking tax, here in question, to a point where most of the private sector is losing money in its overall operation. It doesn't take a graduate economist to understand that losing business ventures eventually go out of existence. This point is especially important when one realizes that after the authorities' bonds and other debts are paid in full the parking authority will go out of ex-

[2] See the Parking Authority Law, Act of June 5, 1947, P. L. 458, as amended, 53 P.S. 341 et seq.

istence, and all of its assets and business will be owned and operated by the City. (See 53 P.S. 354)

This is not a case where one or two marginal private operators are being forced out. *See Philadelphia v. Samuels,* 338 Pa. 321, 12 A. 2d 79 (1940). This is a case where most of the private operators are being forced out of business. It doesn't take a person with psychic powers to see that government, under such facts, will eventually take over all of the parking facilities in the City. Another five or ten per cent increase in this tax may complete the job.

I find this case to be one of the first impression in our courts. The debilitating effect upon a citizen's property rights due to a combination of an unreasonable high tax rate and direct governmental business competition, should be recognized. The new wrinkle in the aged face of the principle that the Legislature possesses unrestricted taxing powers, is the advent of government competing with the private business of its citizens; and this gives the picture a new appearance heretofore unviewed by the courts.

Mr. Justice Holmes, dissenting in the case of *Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S. 218, 223, 72 L. Ed. 857, 859 (1928), and in speaking generally of the taxing powers of the Legislature, said:

> "In those days [referring to the time of Mr. Chief Justice Marshall and *McCulloch v. Maryland,* 4 Wheat. 316, 17 S. Ct. 579 (1819)] it was recogized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and

> that the necessary alternative was to deny it altogether. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise to go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. The power to fix rates is the power to destroy if unlimited, but this Court while it endeavors to prevent confiscation does not prevent the fixing of rates."

Mr. Justice Holmes expresses my sentiments.

I would hold that where government creates an unreasonable tax rate (as found by the majority) which forces private citizens to operate at a deficit, while simultaneously permitting competing governmental operations to continue operating at lower parking rates and with profits from such operation, owing to other tax exemptions, such a tax rate, as a part of the total city tax load imposed on its competition, is a denial of the Equal Protection Clause of the United States Constitution and in addition is illegally confiscatory.

In the Seventeenth Century, J. B. Colbert, Controller-General of Finance to Louis IV, offered a maxim widely accepted for its intrinsic merit:

> "The art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the least amount of hissing." Evans; Dictionary of Quotations; 680; 1st Ed. (1968).

In this case, even the life's blood of the proverbial goose is being drained.

The theory of government's power to tax beyond a reasonable limit, as stated by the majority, is axiomatic.

However, none of the cases cited goes so far as to make such a maxim absolute.

Once again I quote a Mr. Justice Holmes dissent. In the case of *Hyde v. U. S.*, 225 U.S. 347, 391, 56 L. Ed. 1114, 1135 (1912), he said:

> "It is one of the misfortunes of the law that ideals become encysted in phrases and thereafter for a long time cease to provoke further analysis."

The competition of a governmental parking authority adds a new dimension to the tax issues raised and from my point of view requires further analysis. If the government desires both an unreasonable high tax and an unfair competitive business position, it should be forced to prove the need for such a tax.

I would reverse and remand to permit the City to prove its need for this unreasonable tax increase.

Harry A. Kramer,
Judge.

Judge Mencer joins in this Opinion.
Judge Crumlish, Jr. joins in this Opinion.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. 1699 April Term, 1970
In Equity

Alco Parking Corporation; Arena Parking, Inc.; Campus Parking, Inc.; Fourth Avenue Parking, Inc.; Grant Parking, Inc.; Harry W. Sheppard, Jr., t/a Stanwix Auto Park; John Cominos, t/a Liberty Parking; John Stabile and Rocco A. Del Sardo, t/a Wm. Penn Parking Lot; K-Seven Parking Company; Meyers Bros. Parking-Central Corp.; Parking Service Corporation, Inc.; Wm. Penn Parking Garage, Inc.,

Plaintiffs

vs.

City of Pittsburgh,

Defendant

Before: Wessel, McKenna, McCarthy, JJ.

OPINION

Wessel, J.

This matter is before the court *en banc* on plaintiffs' exceptions to the findings of fact and conclusions of law of the Chancellor.

The plaintiffs have filed twelve (12) exceptions to the Chancellor's findings of fact and ten (10) exceptions to the Chancellor's conclusions of law and offered a supplemental brief in which the plaintiffs maintain warrant further discussion on the legal issues involved in this case.

The plaintiffs accuse the Chancellor of misconstruing their position on the various issues and misstated or omitted important facts and submit that rather than review each of the issues raised at trial and in the prior brief, plaintiffs wish only to supplement their prior brief on the two issues of "reasonable classification" and "confiscation."

Having considered plaintiffs' brief in conjunction with the exceptions filed by plaintiffs and after considering the testimony, we are compelled to conclude that the Chancellor did not misconceive the issues nor compound the misconception in his statement that the Parking Tax is "not a tax on 'business' of operating a parking facility" but a tax on "the transaction of parking for a consideration."

It is quite obvious to this Court that the only reason for filing exceptions to the Chancellor's findings of fact and conclusions of law is to give plaintiffs another opportunity for a rehash of the relevant issues heretofore spelled out by the Chancellor in his erudite opinion. The issues raised at the trial of this case were confiscation and classification.

Plaintiffs' brief cites the recent case of *Mellon Square Garage v. Public Parking Authority of Pgh.*, 275 A. 2d 654, to support the proposition that the Parking Tax is a business privilege tax. The *Mellon Square Garage* case

reached the Court on preliminary objections and concerned the interpretation of a sublease which provided for the payment of a rental based upon a percentage of gross receipts. By the terms of this lease, the gross receipts were not to include "the amount of sales or other similar tax required to be collected by the tenant or subtenant." The Court held that the tenant could not deduct the Parking Tax from the gross receipts set forth in the lease in question. We fail to see where this decision supports the proposition cited by the plaintiffs.

In the *University Club v. City of Pittsburgh*, 440 Pa. 562, Mr. Justice Eagen noted that the Parking Tax was a tax upon the transactions involved in parking motor vehicles. Finally, the Ordinance itself describes the tax as a tax on the transaction, not the privilege, of the parking procedure.

On the issue of uniformity, we would call plaintiffs' attention to the case of *Crosson v. Downingtown Area School District*, 440 Pa. 468 (1970) and a very recent opinion of Justice Pomeroy, *F. J. Busse Co. v. City of Pittsburgh* at No. 149 March Term, 1970, wherein Justice Pomeroy makes crystal clear the obligation and burden upon the taxpayer to demonstrate that the taxing classification is unreasonable when he stated:

> "The thrust of appellants' argument is that because the Ordinance imposes a tax on every person engaging in any business in the City, the City may not legitimately exclude any business from the burden of the tax, nor impose different rates of tax on those businesses which are not excluded. The obvious defect in appellants' position is that it fails to recognize that the taxing authority may distinguish

between various classes of taxpayers and that the rate of taxation need be equal only with respect to taxpayers who are within the same class. See e.g. *Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370, 376-78; *Allentown School District Tax Case*, 370 Pa. 161. The test of uniformity is whether there is a reasonable distinction and difference between the classes of taxpayers sufficient to justify different tax treatment. *Commonwealth v. Life Assurance Co. of Pa.*, supra; *Commonwealth v. Girard Life Insurance Co.*, 305 Pa. 558. In the instant case, several of the variations of which appellants complain are based upon specific limitations set by the Enabling Act itself, or by other statutes. Other challenged differences in treatment are necessitated because the Ordinance taxes only businesses, not employees, or because a business is conducted outside of the taxing jurisdiction of the City. Prior case law has established that the burden is upon the taxpayer to demonstrate that the taxing classification is unreasonable. *Wanamaker v. School District of Phila.*, 441 Pa. 567; *Commonwealth v. Life Assurance Co. of Pa.*, supra. Appellants have not met that burden in this case."

The Pennsylvania cases are clear that the test of uniformity is whether there is a reasonable distinction and difference between classes of taxpayers. Plaintiffs cannot argue that the parking business which has been separately classified for regulatory purposes cannot also be classified for the purposes of taxation.

There is no question, in our opinion, that the City of Pittsburgh Parking Tax is a valid exercise of the taxing power of the City of Pittsburgh.

We must further conclude that the burden is upon the plaintiffs to demonstrate that the taxing classification is unreasonable. The law and the evidence cited by the Chancellor in his adjudication point to but one conclusion and that is the plaintiffs have not met that burden in this case.

All of the issues that plaintiffs now raise on exceptions were considered in the Chancellor's adjudication and appropriately disposed of. Accordingly, rather than have a rehash of the legal as well as the evidentiary aspects, we adopt the Chancellor's adjudication as our adjudication in this case.

It is difficult for this Court to understand how the plaintiffs can theorize what was material and what the Chancellor considered in arriving at his particular findings and conclusions. Needless to say, it is the Chancellor's duty, sitting in equity, to consider all of the testimony irrespective of the plaintiffs' opinion as to its relevancy before arriving at a just and equitable decision.

We find nowhere in the record that the Chancellor has misstated or misconstrued the facts or the issues. On the contrary, we reach the conclusion that the Chancellor has based his findings of fact on the probative evidence produced at the trial of this case and reached his conclusions of law based upon the real issues and the law. We are, therefore, compelled to dismiss plaintiffs' exceptions to the Chancellor's adjudication.

Opinion, Court of Common Pleas

FINAL DECREE

AND NOW, to-wit, this 14th day of July, 1971, after hearing and consideration of counsels' arguments and the testimony in this case, and for the foregoing reasons, plaintiffs' exceptions one to twenty-two inclusive be and the same are hereby dismissed.

IT IS FURTHER ORDERED that the costs of this proceeding shall be borne by the plaintiffs and the decree nisi dated March 19, 1971, shall be entered as a final decree herein.

By the Court,
Wessel,
J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA CIVIL DIVISION

No. 1699 April Term, 1970
In Equity

Alco Parking Corporation; Arena Parking, Inc.; Campus Parking, Inc.; Fourth Avenue Parking, Inc.; Grant Parking, Inc.; Harry W. Sheppard, Jr., t/a Stanwix Auto Park; John Cominos, t/a Liberty Parking; John Stabile and Rocco A. Del Sardo, t/a Wm. Penn Parking Lot; K-Seven Parking Company; Meyers Bros. Parking-Central Corp.; Parking Service Corporation, Inc.; Wm. Penn Parking Garage, Inc.

Plaintiffs,

vs.

City of Pittsburgh,

Defendant.

ADJUDICATION

Wessel, J.

This matter is before the Court on a complaint in equity filed by the plaintiffs against the defendant, City of Pittsburgh, to obtain certain equitable relief by restraining the defendant from enforcing the provisions of Ordinance

No. 704, approved December 31, 1969, and from imposing a license tax under the Ordinance for the parking facilities operated by the plaintiffs and, in addition thereto, claim a refund of any taxes paid as a result of the enforcement of Ordinance No. 704, and such other relief as the Court may deem proper.

The defendant filed an answer to the complaint and the issues raised by the pleadings are as follows:

1. Whether the Parking Tax Ordinance violates Article IX, Section 1 of the Pennsylvania Constitution (Uniformity Clause) and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; and

2. Whether the Parking Tax Ordinance violates Article IX, Section 1 of the Pennsylvania Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution in that said Ordinance imposes a rate which is so excessive and unreasonable as to amount to a confiscation of the plaintiff's property.

The plaintiffs contend that Ordinance No. 704 of the City of Pittsburgh violates the Pennsylvania Constitution, as well as the United States Constitution, in that the tax imposed by the Ordinance is not uniform and that they have been denied equal protection of the law—first, because of lack of uniformity and, secondly, the tax is excessive to a degree that amounts to confiscation of their property.

The defendant takes the opposite position and the matter is now before the Court for disposition.

Adjudication, Court of Common Pleas

FINDINGS OF FACT

After hearing testimony and examining the exhibits presented in this case, and the briefs of respective counsel, and upon consideration thereof, the Court finds the following facts:

1. The plaintiffs are private individuals and corporations engaged in the operation of parking lots and garages within the City of Pittsburgh.

2. Defendant, City of Pittsburgh, is a city of the second class, organized and existing under the laws of the Commonwealth of Pennsylvania.

3. Ordinance No. 704 (the Parking Tax Ordinance) was enacted by the City of Pittsburgh in 1969, became effective on February 1, 1970, and provided for a 20% tax on the gross receipts of nonresidential parking operations within the City of Pittsburgh.

4. Ordinance No. 704 superseded and replaced Ordinance No. 674 which was the Parking Tax Ordinance enacted by the City of Pittsburgh in 1968, which established a tax rate of 15% of the gross receipts of all parking operations within the City of Pittsburgh.

5. Ordinance No. 674 superseded and replaced Ordinance No. 434, which was the original Parking Tax Ordinance enacted by the City of Pittsburgh in 1962, which established a tax rate of 10% of the gross receipts of all parking operations within the City of Pittsburgh.

6. Each of the Parking Tax Ordinances was enacted pursuant to the "Local Tax Enabling Act" now amended

and reenacted as the Act of December 31, 1965, P. L. 1257, paragraph 1, et seq., as a general revenue measure.

7. The City Council of the City of Pittsburgh in Ordinance No. 704 asserted, as its justification for separately classifying the parking business for the purpose of special taxation, that nonresidential parking lots and garages, by reason of the frequency rate of their use, the changing intensity of their use at various hours of the day, their location, their relationship to traffic congestion and other characteristics, present problems requiring municipal services and affect the public interests.

8. The Pennsylvania Legislature in the Parking Authority Law, 1947, June 5, P. L. 458, paragraph 1, as amended, 53 P.S. §341, et seq., stated that a parking crisis exists in the City of Pittsburgh. To alleviate that crisis, it authorized the creation of a public parking authority.

9. In findings of fact set forth in Section 2 (53 P.S. 342) in the Parking Authority Law, the Legislature detailed the causes of traffic congestion and the problems created thereby, and further stated the need for both public and private parking operations to relieve such traffic congestion and the problems arising therefrom.

10. The findings of the Pennsylvania Legislature in the Parking Authority Law continued to be valid, as shown by recent studies which state that there is a current deficiency of 4,100 parking spaces in downtown Pittsburgh, in spite of the existence of a total of 24,000 parking spaces within the City of Pittsburgh, of which plaintiffs herein operate 17,471 parking spaces.

11. The existence of public, business and entertainment facilities in the metropolitan area of Pittsburgh, such as, department stores, movies, theaters, hotels, restaurants, bars, office buildings, municipal buildings, etc. are the reasons for the flow of vehicular traffic to and from the City and are the generators of traffic congestion.

12. Parking lots and garages owned by the Public Parking Authority of the City of Pittsburgh, which were created pursuant to the Parking Authority Law and which are operated by lessees and managers for lessees, some of whom are plaintiffs in this case, are identical in their function, operation and purpose as the private parking garages and lots owned and operated by the plaintiffs.

13. Parking operators, including the plaintiffs herein, make substantial investments in each parking operation by pledging their credit by signing long-term leases continuing guaranteed annual rentals.

14. Plaintiffs herein have paid all parking taxes required under the various City of Pittsburgh Parking Tax Ordinances from the inception of the tax to the institution of this action.

15. All other parking lot and garage operators in the City of Pittsburgh, private and nonprivate, including the garages and/or operated by the Pittsburgh Parking Authority are also subject to and paid the parking taxes imposed by the various Parking Tax Ordinances.

16. The 1970 revenues outlined in plaintiffs' Exhibit 1 are based not on actual receipts, but on ratios established in 1969, therefore, assuming the exhibits for 1970 to be the same as those for 1969.

17. Some garages are missing from various operations of plaintiffs listed in plaintiffs' Exhibit No. 1, their absence serving to distort the projection.

18. Plaintiffs' expert failed to compute net profits as part of the projection in plaintiffs' Exhibit No. 1.

19. The demand for parking spaces in the City of Pittsburgh far exceeds the supply.

20. None of the plaintiffs have increased their rates since February of 1970.

21. Plaintiffs have not attempted to pass on the increased tax to the parking lot patrons.

22. Forty per cent (40%) of the cars in the Golden Triangle during rush hours are either going to or just leaving parking garages.

23. This is a period of economic inflation with increased labor costs, interest rates, construction costs and other factors which affect the expansion plans, day-to-day operations, and profits of the plaintiffs.

24. The plaintiffs' expert considered only the financial conditions of the plaintiffs in this case and not that of the parking industry as a whole in compiling plaintiffs' Exhibit No. 1.

25. Comparison of the gross receipts of the plaintiffs' operations with the parking taxes paid in 1968 and 1969 shows that plaintiffs have a net increase in the amount of revenue left after taxes but before other expenses were deducted in those years.

26. Fifty per cent (50%) of the downtown area of the City of Pittsburgh is either used for streets or for parking lots.

27. The City of Pittsburgh experienced only a temporary reduction in the number of cars parked at its facility on the Wharf after it doubled its price for parking.

DISCUSSION

Pursuant to the "Local Tax Enabling Act" of 1964, 53 P.S. 6901 et seq., the Council of the City of Pittsburgh enacted Ordinance No. 704, approved December 31, 1969, providing for the levying, assessment and collection of a 20% tax on the transaction of parking motor vehicles on nonresidential parking lots, including those lots operated by the Public Parking Authority of the City of Pittsburgh and other nonprofit organizations, beginning with the tax year 1970 and annually thereafter.

The plaintiffs, private individual corporations engaged in the operation of parking lots and garages within the City of Pittsburgh, filed a complaint in equity attacking the validity of the Parking Tax Ordinance and seek to enjoin the collection of the said tax.

In 1962 the City of Pittsburgh imposed a tax of 10% upon the gross receipts derived from commercial parking transactions (Ordinance No. 434, approved December 27, 1962). In every consecutive year from 1962, the parking tax was reenacted. In December of 1968, Ordinance No.

674 reenacted this tax to increase the rate to 15% upon the gross receipts from commercial parking transactions. Ordinance No. 704 of 1969, the ordinance involved in the instant case, follows the same basic pattern as previous ordinances but increased the tax to 20%.

Section 3 of Ordinance No. 704 provides as follows:

> "Imposition of Tax: A tax for general revenue purposes is hereby imposed upon all transactions of each operator with respect to each nonresidential parking place at the rate of 20 per centum (20%) of the gross receipts from all such transactions received during the year 1970, and thereafter, from year to year on a calendar year basis."

Section 2 (e) defines "operator" to include the Public Parking Authority of the City of Pittsburgh and nonprofit corporations which store or park cars for a consideration.

Section 2 (c) of the Ordinance defines the nonresidential parking place subject to the tax as follows:

> " 'Nonresidential Parking Place' or 'Parking Place'—any place within the City, whether wholly or partially enclosed or open, at which motor vehicles are parked or stored for any period of time in return for a consideration not including:
>
> "(i) any parking area or garage to the extent that it is provided or leased to the occupants of a residence on the same or other premises for use only in connection with, and as accessory to, the occupancy of such residence and

"(ii) any parking area or garage operated exclusively by an owner or lessee of a hotel, an apartment hotel, tourist court or trailer park, to the extent that the parking area or garage is provided to guests or tenants of such hotel, tourist court or trailer park for no additional consideration.

"As used herein, the term 'residence' includes (i) any building designed and used for family living or sleeping purposes other than a hotel, apartment hotel, tourist court or trailer park, and (ii) any dwelling unit located in a hotel or apartment hotel."

The defendant disagrees with the plaintiffs and argues that the classification of nonresidential parking businesses for the purpose of taxation is a reasonable and valid classification under Article VIII, Section 1 of the Pennsylvania Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and cites *Philadelphia v. Samuels*, 338 Pa. 321; *Sley System Garages v. Philadelphia*, 338 Pa. 321; *C. A. McGillick v. City of Pittsburgh*, 415 Pa. 581; *University Club v. City of Pittsburgh*, 271 A. 2d 221 (1970).

The *Samuels* and *Sley* cases concern the parking tax levied by the City of Philadelphia on the transaction of parking in an open parking lot and said tax in the amount of 10% was levied upon the gross receipts of the parking lot operator.

The defendants raised the issue of classification and argued that the Philadelphia Municipal Council did not have reasonable grounds to establish the classification of parking lots. This same issue was raised by the plaintiffs in the instant case.

The Court held that "the separation of open parking lots from closed garages and placing them in separate classes for the purpose of taxing the parking transaction in the open lot cannot be said to constitute an unreasonable and arbitrary difference of classification."

In the *McGillick* case, which involved the initial Pittsburgh Parking Tax Ordinance, thirty-three (33) parking lot operators raised the issue of the legality of the classification of "commercial" parking lots for tax purposes. The Court held:

> "We believe that the placing of commercial parking places in a taxable class and placing residential parking places in a nontaxable class is a realistic and practical classification. The Stonier-Bruner Act itself enjoins the Court not to 'interfere with the reasonable discretion of the legislative body in selecting the subjects or fixing the rates of the tax'."

In the *University Club v. City of Pittsburgh* case, supra, the Court upheld the authority of the City to levy a tax on the nonresidential parking transaction. Mr. Justice Eagen, speaking for the Court, said:

> "That the City had the power to tax the appellant in the manner in which it did we think is evident from the Local Tax Enabling Act, Act No. 481 of June 25, 1947, P. L. 1145, reenacted and clarified by Act No. 511 of December 31, 1965, 53 P.S. §6902 (1970 Supp.) (The Tax Anything Act). The act conferred upon political subdivisions the power to levy taxes upon all subjects of taxation which the Commonwealth has the power to tax but which it

has not so exercised. Section 2 (7) of the 1965 Act contains the only restriction on taxing private social organizations:

. . .

"Since parking transactions for which a consideration is paid are nowhere mentioned in the exception, it is a reasonable assumption that they are proper subjects of taxation."

In the face of these clearly cut decisions we find no merit in the plaintiffs' position that the decisions only validated the subclassification and did not establish the validity of the classification of the parking business for the purpose of a tax.

As we see it, the instant tax is not a tax on the "business" of operating a parking facility but is on the transaction of parking for a consideration and includes nonprofit organizations as well as business enterprises. And further, the courts have repeatedly emphasized the broad discretion of the legislative body to establish classifications for tax purposes. See *Coe v. Duffield,* 185 Pa. Super. 532; *Philadelphia v. Smith,* 412 Pa. 262; *Philadelphia v. Depuy,* 431 Pa. 276.

We feel the plaintiffs have gone a little afield in presenting their position and the points upon which they base their arguments, i.e., that the Parking Authority Act limits municipal taxing power; that businesses that confer a public benefit have special tax status; that all business should be uniformly taxed; that the rate of tax should be adjusted to meet the cost of regulation; and that liability for other taxes is a factor in determining uniformity of a given tax.

Adjudication, Court of Common Pleas

We all agree that commercial parking facilities are essential for a metropolitan community and are required to preserve the shopping and business areas of the community, but desirability or nondesirability of a service or business is not the basis upon which to hinge the imposition of a tax.

The Parking Authority Law, supra, has nothing to do with the taxing power of the municipality. The limitations of the Local Tax Enabling Act govern the municipality and, in effect, establishes the basis upon which the City, in the exercise of reasonable judgment, may establish a tax.

In the instant case the City reached the conclusion that the parking lot transactions which provide services and a convenience to non-City residents who otherwise pay no taxes and which produce certain problems of traffic control and supervision, is a reasonable class for the production of municipal revenue.

In addition, the same General Assembly that enacted the Public Parking Authority Act also enacted legislation to empower municipalities to regulate and license commercial parking facilities in the public interest. (See Act of June 5, 1947, P. L. 458, as amended)

If the General Assembly wished to give commercial lot operators tax exemptions or privileged status, such exemption could have been written into either the Parking Authority Law or even Act 511 itself. In the absence of such a mandate, the parking business or parking customer has no claim to privileged status.

In *Philadelphia v. Depuy*, 431 Pa. 276, Mr. Justice Roberts, in his opinion at page 279, stated:

"We start with the well-established proposition that one seeking to show a statute unconstitutional must carry a very heavy burden. This doctrine was most recently reiterated in *Commonwealth v. Life Assurance Co. of Pennsylvania,* 419 Pa. 370, 214 A. 2d 209 (1965), appeal dismissed for want of a substantial federal question, 384 U.S. 268, 86 S. Ct. 1476 (1966), where we held that although there must be some reasonable basis for distinguishing one taxable from another, it is the allegedly aggrieved taxpayer who must demonstrate the lack of such basis. 'All doubt is to be resolved in favor of sustaining the legislation.' *Milk Control Commission v. Battista,* 413 Pa. 652, 659, 198 A. 2d 840, 843 (1964); *Anstine v. Zoning Board of Adjustment,* 411 Pa. 33, 190 A. 2d 712 (1963). Moreover, the taxpayer's burden will be deemed met only if the challenged statute *'clearly, palpably* and *plainly* violates the Constitution.' *Daly v. Hemphill,* 411 Pa. 263, 271, 191 A. 2d 835, 840 (1963) (Emphasis in original); *Chartiers Valley Joint Schools v. Allegheny County Board of School Directors,* 418 Pa. 520, 546, 210 A. 2d 487, 501 (1965). The court below found that appellants failed to carry their heavy burden of showing that there existed no reasonable basis for distinguishing gas from electric companies. We agree."

While the plaintiffs argue there are numerous causes of traffic congestion and that persons use commercial areas for a variety of reasons, the fact remains that the parking facility is a special convenience to the parker, Pittsburgh resident and non-resident alike, and that the use of such facilities at peak hours and the resulting traf-

fic congestion of entrance and exit are attributes which are "unique" to this particular operation. (See T-390)

Parking facilities serve the cars of patrons using the restaurants, bars, department stores, office buildings, hospitals and any other operation which serves as a focus for human activity, but these inter-relationships do not remove the unique characteristics of the parking transaction. Persons using and parking cars place a different burden on the municipality than persons utilizing public transportation.

As previously pointed out, the Supreme Court has clearly approved the classification of the nonresidential parking transaction for the purpose of taxation. The General Assembly has singled out the parking "business" for the purpose of regulation and Section 6 of Act 511, 53 P.S. Supp. 6906, states "that the courts shall not interfere with the reasonable discretion of the legislative body in selecting the subjects or affixing the rates of the tax."

The only limitation placed upon the power of the Legislature to distinguish between various entities for purposes of taxation is that their basis for doing so be reasonable. See *Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370.

We are compelled to conclude, therefore, that the plaintiffs have failed to carry their heavy burden of showing that there existed no reasonable basis for the classification of distinguishing one taxable or class of taxables from another.

As long as a valid distinction between classes or between overlapping members of one class and another exist, the wisdom of the legislative policy is not a matter

for the courts. See *Commonwealth v. Lafferty*, 426 Pa. 541 (1967).

All of the issues raised by the plaintiffs, viz., double taxation, the Public Parking Authority being exempt from a property tax, and the question of double taxation as well as uniformity, have been heretofore considered and disposed of by the Supreme Court. See *McGillick v. Pittsburgh*, supra; *Plumley v. Philadelphia School District*, 182 Pa. Super. 122; *University Club v. City of Pittsburgh*, supra; *Commonwealth v. Life Assurance Co. of Pa., supra; Tax Review Board v. Devine*, 184 Pa. Super. 297; and *Williams & Co. v. School District of Pittsburgh*, 438 Pa. 509.

Accordingly, we will address ourselves, therefore, to the issue raised by plaintiffs that the Parking Tax Ordinance violates Article IX, Section 1 of the Pennsylvania Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution in that the Ordinance imposes a rate which is so excessive and unreasonable as to amount to a confiscation of the plaintiffs' property. The plaintiffs, in raising this issue, argue that they are unable to pass on the parking tax and, due to the 20% parking tax, the parking business in Pittsburgh has become unprofitable.

An examination of the record convinces us that the plaintiffs are continuing in business and making a profit from such operations, although the profit may not be as great a margin as plaintiffs may feel they are entitled and take the position that their operating costs, at a rate of less than 10%, represents confiscation of its business. We must hasten to point out that the record shows the following:

1. There remains a parking shortage of 4,000 spaces within the City of Pittsburgh. (T-300)

2. The five-point increase in taxes of from 15% to 20% has not been passed on to parking lot customers. (T-114, 170, 301-302)

3. The gross receipts reported by parking lot operators increased between 1968 and 1969 and remained stable between 1969 and 1970 despite the tax increase. (T-400)

4. Statistical exhibits prepared by plaintiffs show a reduction in return from 10% but indicate that even peripheral lots continue to operate at a profit. (T-141)

5. Decreased return is due to increased labor costs and other factors as well as tax liability. (T-161, 307)

Based on these pertinent facts, we can only conclude that the plaintiffs are suggesting to the Court that they are entitled to a rate of 10% or more on their operating costs. Otherwise, a rate of less than 10% would amount to confiscation of plaintiffs' business. To this we need only reiterate Mr. Justice Linn's opinion in *Philadelphia v. Samuels*, supra:

"Little need be said on the point that the ordinance is confiscatory. The State expressly authorized the City to levy taxes for general revenue purposes and the ordinance so provides. There is nothing in the record to show that the rate imposed by the ordinance is so high as to result in taking property without due process. The probability is that, in

effect, the tax will be passed on to patrons, but if it is not, and if an occasional operator cannot afford to continue in business and pay the tax, it may be unfortunate but will not render the ordinance invalid."

We do not feel the Court should be asked to decide the question of reasonable return of profit any more than the Court should be compelled to decide what subjects upon which the City proposes a tax, or the type of a tax. These subjects are not for the Court.

As we see it, the parking tax, is a tax on the privilege of operating a parking business or a tax on the income of the operator but, rather, a tax on the *transaction* of parking for a consideration. Plaintiffs' recourse, like the City itself, remains to recoup its tax liability, as well as its labor costs and similar increased costs of operation from persons using the parking facility. (T-402)

The City of Pittsburgh and the plaintiffs are agreed that the commercial areas of the City must grow and prosper and parking facilities are important for such growth. But, in the exercise of its discretionary power, Council has felt that an increase in tax on the parking transaction would not be detrimental to the welfare of the City.

The plaintiffs may suffer some dimunition in income but even proven economic disadvantage is not sufficient to establish confiscation. *Commonwealth v. Life Assurance Co. of Pa.*, supra.

We are compelled to conclude, therefore, that plaintiffs' reduced margin of profit is not sufficient to meet the burden of establishing confiscation.

Adjudication, Court of Common Pleas

CONCLUSIONS OF LAW

1. This court sitting in equity has jurisdiction of the parties and of the subject matter of this proceeding.

2. The City of Pittsburgh has the power to enact Ordinance No. 704 of 1970 pursuant to the Local Tax Enabling Act, Act 511 of December 31, 1965, 53 P.S. §6901 et seq.

3. The separate classification of the nonresidential parking lots and garages for taxation purposes is valid and reasonable.

4. The burden of proving that a classification is unreasonable rests solely and heavily on the party attacking the classification.

5. When a piece of legislation is attacked, all doubts are to be resolved in favor of sustaining the legislation.

6. The Parking Authority Law, Act of June 5, 1947, P. L. 458, paragraph 1, as amended, 53 P.S. 341, et seq., is irrelevant and immaterial to the within proceeding.

7. General revenue taxes, unlike license fees, need demonstrate no relationship between the amount of money collected under the general revenue measure and the amount of expense involved in servicing the taxed parties.

8. A nondiscriminatory tax, such as the parking tax, does not become constitutionally tainted because certain members of the class which it taxes, and not others of the same class, must pay other taxes imposed by other valid tax laws.

9. The Pittsburgh Parking Tax is a tax upon the *transactions* involved in parking motor vehicles, while the Pittsburgh Business Privilege Tax is a tax upon the privilege of doing business in the City of Pittsburgh. There is no double taxation involved.

10. The City of Pittsburgh Parking Tax is neither confiscatory nor violative of due process.

11. A tax rate which allows facilities to operate at a fair rate of return is not confiscatory, even though a few borderline operations may falter by the way.

DECREE NISI

AND NOW, to-wit, this 19th day of March, 1971, after hearing and consideration of counsel's arguments and the testimony in this case, and for the foregoing reasons, it is ordered, adjudged and decreed that the action in equity filed by the plaintiffs to enjoin the operation of Ordinance No. 704 of 1969, the Parking Tax Ordinance of the City of Pittsburgh, be and the same is hereby dismissed.

IT IS FURTHER ORDERED AND DECREED that if no exceptions are filed hereto within twenty (20) days of notice of filing this adjudication, the decree nisi shall be entered by the Prothonotary upon praecipe as a final decree herein in accordance with Rule of Civil Procedure No. 1519(a).

By the Court,
Wessel,
J.

Ordinance No. 704

NO. 704

AN ORDINANCE—To provide for the general revenue by imposing a tax of 20 per centum upon the transactions involved in parking motor vehicles at parking places, other than residential parking places, as measured by the gross receipts received therefrom by the operators thereof; requiring a license and the payment of the tax as a condition to the conducting of such transactions; providing for the levy and collection of such tax; prescribing requirements for returns and records; conferring powers and duties upon the Treasurer; and imposing penalties.

WHEREAS, Non residential parking places for motor vehicles, by reason of the frequency rate of their use, the changing intensity of their use at various hours of the day, their location, their relationship to traffic congestion and other characteristics, present problems requiring municipal services and affect the public interest, differently from parking places accessory to the use and occupancy of residences; and

WHEREAS, a tax for general revenue purposes upon the transactions involved in parking or storing motor vehicles at non residential parking places would therefore be appropriate; and

WHEREAS, it is necessary in the public interest to increase the parking tax rate for the year 1970; Now, Therefore,

THE COUNCIL OF THE CITY OF PITTSBURGH, UNDER THE AUTHORITY OF ACT NO. 511 OF 1965, AND ITS AMENDMENTS, HEREBY ENACTS AS FOLLOWS:

Ordinance No. 704

Section 1. Title: This ordinance shall be known as the "Parking Tax Ordinance."

Section 2. Definitions: As used in this ordinance, unless the context indicates clearly a different meaning, the following words and phrases shall have the meanings set forth below:

(a) "City"—the City of Pittsburgh.

(b) "Person"—any natural person, partnership, unincorporated association or corporation, non profit or otherwise. Whenever used in any provision prescribing a fine or a penalty, the word "Person", as applied to partnerships, shall mean the partners thereof, as applied to unincorporated associations, shall mean the members thereof, and as applied to corporations, shall mean the officers thereof.

(c) "Non-Residential Parking Place" or "Parking Place"—any place within the City, whether wholly or partially enclosed or open, at which motor vehicles are parked or stored for any period of time in return for a consideration not including:

(i) any parking area or garage to the extent that it is provided or leased to the occupants of a residence on the same or other premises for use only in connection with, and as accessory to, the occupancy of such residence, and (ii) any parking area or garage operated exclusively by an owner or lessee of a hotel, an apartment hotel, tourist court or trailer park, to the extent that the parking area or garage is provided to guests or tenants of such hotel, tourist court or trailer park for no additional consideration.

As used herein, the term "residence" includes (i) any buliding designed and used for family living or sleeping purposes other than a hotel, apartment hotel, tourist court or trailer park, and (ii) any dwelling unit located in a hotel or apartment hotel.

The terms "hotel", "apartment hotel", "tourist court", "trailer park" and "dwelling unit" are used herein as defined in the Zoning Ordinance, Ordinance No. 192, approved May 10, 1958, as amended.

(d) "Month"—a calendar month.

(e) "Operator"—any person conducting the operation of a parking place or receiving the consideration for the parking or storage of motor vehicles at such parking place; the term does not include the City but does include the Public Parking Authority of the City of Pittsburgh and does include operators on premises of Public Parking Authority of the City of Pittsburgh and non profit corporations which store or park vehicles for a consideration.

(f) "Transaction"—the transaction involved in the parking or storing of a motor vehicle at a non-residential parking place for a consideration.

(g) "Consideration"—refers to consideration received upon an express or implied contract or under a lease or otherwise, whether or not separately stated, and whether or not paid, provided or allowed by the person on whose behalf the motor vehicle is parked or stored or by some other person.

(h) "Gross Receipts"—the monetary amount of the aggregate consideration from transactions.

(i) "Treasurer"—the Treasurer of the City of Pittsburgh.

Section 3. Imposition of Tax: A tax for general revenue purposes is hereby imposed upon all transactions of each operator with respect to each non-residential parking place, at the rate of 20 per centum (20%) of the gross receipts from all such transactions received during the year 1970, and thereafter, from year to year on a calendar year basis. No persons shall conduct such transactions without complying with all the provisions of this ordinance and paying the tax hereby imposed.

Section 4. Annual License: No operator shall conduct the operation of a non-residential parking place without obtaining for each parking place an annual license from the Director of the Department of Public Safety of the City of Pittsburgh as required by Ordinance No. 435, approved December 27, 1962, within the time specified. Any operator not possessing such license for each parking place for the year 1970 or any following year shall obtain such license within thirty (30) days after the effective date of this Ordinance, and any person who intends to begin conducting the operation of a non-residential parking place shall obtain such a license before beginning such operation. At each parking place, the operator shall display the license in a conspicuous location at all times. Such licenses shall not be transferable between one operator and another or between one parking place and another. Any operator who ceases to conduct the operation of a parking place shall notify the Treasurer and return the license applicable thereto.

Section 5. Records: Each operator shall maintain, separately with respect to each parking place, complete

and accurate records of transactions and of gross receipts of all transactions. Each operator shall issue to the person paying consideration, written evidence of such transactions or classes of transactions as the Treasurer may prescribe by regulations. Where consideration in a transaction is not separately stated, the operator shall maintain such evidence and records as are necessary to segregate the consideration applicable to the transaction. Each operator shall afford the Treasurer and his designated employees and agents access to all such records and evidence at all reasonable times and shall provide verification of the same as the Treasurer may require.

The Treasurer and agents designated by him are hereby authorized to examine the books, papers and records of any operator or supposed operator in order to verify the accuracy of any return made, or if no return has been made, to ascertain the tax due. Every such operator, or supposed operator, is hereby directed and required to give to the Treasurer, or any agent designated by him, the means, facilities and opportunity for such examinations and investigations, as are hereby authorized.

Section 6. Returns and Payments: Each Operator, upon forms prescribed by the Treasurer shall file, on or before April 30, July 31, October 31, of the current tax year, and January 31, of the following year, returns showing gross receipts received with respect to each parking place during the respective three-month period ending on the last day of any month preceding the month in which the return due date occurs. At the time of filing the return, the operator shall pay to the Treasurer all tax due for the period to which the return applies.

Any operator who for the preceding quarterly period has failed to pay over the proper amount of tax to the Treasurer may be required by the Treasury to file subsequent returns and pay the tax monthly. In such cases, payments of the tax shall be made to the Treasurer on or before the last day of the month succeeding the month for which the tax was due.

The City Treasurer is hereby authorized to accept payment under protest of the amount of parking tax claimed by the City in any case where the taxpayer disputes the validity or amount of the City's claim for tax. If it is thereafter judicially determined by a court of competent jurisdiction that the City has been overpaid, the amount of the overpayment shall be refunded to the taxpayer.

Any operator who ceases to conduct the operation of a parking place shall notify the Treasurer and pay all taxes due in thirty (30) days.

Section 7. Treasurer's Powers and Duties. The Treasurer, on behalf of the City, shall receive and collect the taxes, interest, fines and penalties imposed by this ordinance, and shall maintain records showing the amounts received and the dates such amounts were received. The Treasurer shall adopt and enforce regulations relating to any matter pertaining to the administration of this Ordinance, including, but not limited to, requirements for evidence and records and forms for applications, licenses and returns.

Section 8. Collection: The Treasurer shall collect, by suit or otherwise, all taxes, interest, costs, fines and penalties due under this Ordinance and unpaid. If for

any reason, any tax is not paid when due, interest at the rate of six per cent (6%) per year on the amount of unpaid tax and an additional penalty of one-half of one per cent (½ of 1%) of the amount of unpaid tax for each month or fraction of month during which tax remains unpaid shall be added and collected. Whenever suit is brought for the recovery of unpaid tax the operator shall, in addition, be liable for the costs of collection as well as for interest and penalties.

Section 9. Violations: Any person who violates any provision of this Ordinance or any regulation adopted pursuant to it shall, upon conviction thereof before any alderman or magistrate, be liable for a fine of not more than three hundred dollars ($300.00) or, in default of payment of such fine, shall be imprisoned in the Allegheny County Jail or Allegheny County Workhouse for a period not exceeding thirty (30) days.

Section 10. Severability. If a final decision of a court of competent jurisdiction holds any provision of this Ordinance, or the application of any provision to any circumstances, to be illegal or unconstitutional, the other provisions of this Ordinance, or the application of such provision to other circumstances, shall remain in force and effect. The intention of Council is that the provisions of this Ordinance shall be severable and that this Ordinance would have been adopted if any such illegal or unconstitutional provisions had not been included.

Section 11. Ordinance No. 674, approved December 28, 1968, entitled "An Ordinance to provide for the general revenue by imposing a tax of 15 per centum upon the transactions involved in parking motor vehicles at commercial parking places, as measured by the gross re-

ceipts received therefrom by the operators thereof; requiring a license and the payment of the tax as a condition to the conducting of such transactions; providing for the levy and collection of such tax; prescribing requirements for returns and records, conferring powers and duties upon the Treasurer; and imposing penalties" shall remain in effect until the effective date of this Ordinance.

Section 12. Effective Date. This Ordinance shall become effective February 1, 1970, and shall remain in effect thereafter from year to year on a calendar year basis.

Section 13. That any Ordinance or part of Ordinance, conflicting with the provisions of this Ordinance, be and the same is hereby repealed so far as the same affects this Ordinance.

Passed December 29, 1969.

Approved December 31, 1969.

Ordinance Book 71, Page 254.